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Discretion Exercised by Montana County Attorneys in Criminal Prosecutions

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NOTES

DISCRETION EXERCISED BY MONTANA COUNTY ATTORNEYS IN CRIMINAL PROSECUTIONS

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INTRODUCTION

In Montana, as in most other states, the prosecuting attorney has a great amount of discretion. The Missouri crime survey conducted in 1926 found that "The public prosecutor has more power and discretion in the processes of law enforcement than the circuit judge or any other official."[1]

[1]Lashly, *Preparation and Presentation of the States Case*, MISSOURI CRIME SURVEY 113, 159 (Missouri Association for Criminal Justice, 1926). Some indication of the importance of the county attorney's discretion in the criminal process is given by the

In Montana the exercise of discretion is subject to well-defined controls.[2] Statutes explicitly delineate the duties of county attorneys. In addition, the courts and the attorney general have broadly construed powers[3] to supervise, assist, remove and replace the county attorney. However, these duties are seldom enforced and the controls seldom exercised. A prosecuting attorney must commit a serious malfeasance in office before a judge or an attorney general will take action.[4]

The office of the county attorney operates, in effect, as a very specialized administrative agency. As a part of his duties, the county attorney must make countless quasi-judicial and legislative determinations. Other agencies are subject to a complex and effective system of checks to prevent abuses of discretion. The same reasons that necessitated the establishments of these checks should require similar limitations upon the power of the county attorney. Yet, under present law, no effective remedies are available in many instances where abuse of a county attorney's discretion may harm society or an individual. Clearly the prosecutor needs broad discretion in his actions; but this power must be subject to reasonable limitations and adequate procedures must exist to prevent the limitations from being transcended.

Considering the significance of this area, very few studies have investigated the discretion exercised by prosecutors.[5] This article will explore the current state of the law concerning the discretion which may validly be exercised by county attorneys, what discretion is actually exercised and what factors influence the exercise of discretion. The main object of the study is to suggest procedural and statutory changes which might enhance the administration of criminal justice in Montana.

Docket Study for One Montana County, TABLE 1. The county attorney filed no complaint in about 23% of the cases reported to him by the police. Of the felonies in which complaints were filed, 62% were later dismissed, and the charges were reduced in an additional 35% of the cases either before or after the filing of the complaint.

[2]The prosecutor must act in good faith, "and exercise all reasonable and lawful diligence in every phase of his work." State v. Winne, 12 N.J. 152, 96 A.2d 63 (1953).

[3]See State *ex rel.* Nolan v. District Court, 22 Mont. 25, 55 Pac. 916, 917 (1899).

[4]Nedrud, *The Role of the Prosecutor in Criminal Procedure,* 32 U. MO. AT KANSAS CITY L. REV. 142, 169 (1964).

[5]"[N]o serious study of the prosecutorial discretion has appeared in print within the past three decades." Kaplan, *The Prosecutorial Discretion—A Comment,* 60 NW. U. L. REV. 174, 175 (1965). The American Bar Foundation, however, is currently engaged in an extensive national survey of the area.

Table No. I.

1964 Docket Study for One Montana County*

	Cases given to county attorney by city police‡				Results of cases in which complaints were filed by county attorney				Guilty pleas			Charge reductions		
	No.	No comp. filed	Complaint filed: For offense booked by police	Complaint filed: For lesser offense	No.	Dismissed: After complaint filed	Dismissed: After initial appearance	Sentenced or acquitted	No.	Stage: Arraignment	Stage: Trial	No.	% with guilty pleas: Yes	% with guilty pleas: Unknown
		%	%	%		%	%	%		%	%		%	%
Felonies	85	23.5	57.6	18.9	116	45.7	16.4	37.9	26	19.2	80.8	22	72.7	27.3
†Misdemeanors					150	14.0	5.3	80.7	69	0.0	100.0	1	100.0	0.0

* 1964 was selected because nearly all of the complaints filed in that year had either been prosecuted to a conclusion or dismissed by the time this study was conducted (February, 1966).

‡ The author has no information concerning the cases turned over to the county attorney by the sheriff's department, state and federal agencies, private persons, etc., in which no complaint was filed.

† These cases were randomly selected from approximately 600 misdemeanor complaints filed by the county attorneys' offices in 1964.

Table No. II.

Docket Study Based on Individual Crime Forms Returned by Montana County Attorneys.

	Total*		No. of prior convictions	Quality of investigation			Probability of conviction†	Personal factor‡
	No.	%	Mean	good %	sat. %	poor %	Mean	Mean
Total cases reported	95	100.0						
No. complaints filed	11	11.6	0.7	9.1	81.8	9.1	2.6	+1.8
Cases dismissed	10	10.5	0.5	60.0	40.0	0.0	2.1	+1.3
Defendant sentenced or acquitted	74	77.9	1.6	44.6	45.9	9.5	2.6	−0.1

* The Montana county attorneys who returned crime forms tended to report only crimes in which there has been a completed prosecution. The percentage of cases in which no complaint is filed and which are dismissed before trial should probably be much higher than is shown by this table. Table I, the "One County Docket Study," provides a more correct indication of the mortality rate of criminal cases on their way to trial in Montana.

† The county attorneys were asked how certain they felt, before deciding whether to prosecute, of their ability to secure a conviction in the particular case. Their answers were numerically ranked as follows: (1) positive of a conviction; (2) reasonably certain; (3) uncertain; (4) positive that a conviction could not be secured.

‡ This is an attempt to show objectively the importance of various factors which, entirely apart from questions of guilt or the weight of the evidence, influence the county attorney's discretion in the disposition of criminal cases. A personal factor was derived for each "criminal" reported in a crime form by calculating, on the following scale, the sum of the personal characteristics attributed to him by the county attorney: OCCUPATIONS: professional or student (+3), white collar (+2), skilled (+1), unemployed (−1); DEPENDENTS: 1 (+1), 2-4 (+2), 5 or more (+3); AGE: under 22 or over 65 (+1); INTELLIGENCE: high (+1), low (−1); PRIOR CONVICTIONS: 1 (−1), 2 or more (−2); PUBLIC PRESSURE: strong for (+2), for (+1), against (−1), strong against the defendant (−2); MISCELLANEOUS: transient (−1), female (+1), non-white (−1).

EXTENT OF DISCRETION[6]

The Montana Supreme Court held that:

> [A] prosecuting officer is charged with the duty of determining when to commence a particular prosecution, and when to discontinue

[6]During the course of this survey county attorneys expressed the following opinions concerning the extent of their discretion.

The county attorney should be allowed more discretion in the prosecution of criminal cases: Under present statutes the prosecutor has no discretion, but since he must exercise discretion in the filing, prosecution and dismissal of charges, the law should recognize this discretion; Many circumstances require the exercise of discretion to prevent injustice; The present criminal code is almost inapplicable to modern society; The legislature cannot anticipate the variety of situations to which criminal laws will apply; The county attorney must determine his course of action for each case with particular reference to the victim, the criminal, and public opinion; The county attorney loses reputation when he loses cases—he should have sufficient discretion to avoid prosecuting cases which he thinks he cannot win; He should be given a sufficient amount of discretion so that from his knowledge of the law, and of the facts and circumstances surrounding the crime, he can determine whether the prosecution will affect rehabilitation, and whether the community will benefit from prosecution—and on that basis either prosecute or not prosecute; The county attorney should have discretion not to prosecute certain laws in some cases (etc., [illegible] laws).

> it. . . . The county attorney in this state not only directs under what conditions a criminal action shall be commenced, but from the time it begins until it ends his supervision and control is complete, limited only by such restrictions as the law imposes.[7]

The broad scope of the prosecutor's discretion is necessitated to a large extent by his limited resources. He lacks the time to adequately investigate and prosecute every criminal violation coming to his attention. Because of the low salary scale, nearly every Montana county attorney also has a private practice which competes for his attention. A large share of the time which he does devote to his public duties is spent handling county business of a civil nature.[8] In addition, the low budgets available to county attorneys often prevent them from hiring a sufficient number of legal and investigative assistants.[9]

Out of all of the substantial reports of crimes coming to the attention of Montana prosecutors, approximately six per cent are not investigated and eleven percent are not prosecuted primarily because of lack of time and financial resources.[10] This problem is not endemic to Montana.

> [N]o prosecutor can even investigate all of the cases in which he receives complaints. If the Department of Justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff would be inadequate. . . . What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.[11]

The extent of discretion currently available to the county attorney should not be reduced: It would be better to up-grade the office of the county attorney than to reduce discretion; Any restriction upon discretion will decrease the effectiveness of prosecution.

The county attorney should have less discretion: He has too much power in the justice of the peace court prosecutions where he serves as both advisor to the justice and prosecutor; Because of the practice of directly filing informations, there is generally no proper determination of probable cause—grand jury indictments should be required in certain cases; A special panel of attorneys should be established to review discretionary decisions of the county attorney which are challenged.

[7]Halladay v. State Bank of Fairfield, 66 Mont. 111, 212 Pac. 861 (1923).

[8]Baker and DeLong, *The Prosecuting Attorney and His Office*, 25 J. CRIM. L., C. & P.S. 695, 708-709 (1935).

[9]Nineteen county attorneys indicated that an average budget increase of 37% would be necessary to enable them to devote a sufficient amount of time to their duties and to hire a sufficient number of assistants. This lack of funds is more than twice as acute in the large counties than in the small counties. See Table 9.

A few Montana county attorneys indicated that they have at present an ample budget and sufficient time to properly handle all criminal cases coming to their attention. They said the prosecutor is rushed for time, but that is typical in the practice of law; that the prosecutor would have much more work if he prosecuted all crimes, but that would be socially harmful; and that lack of resources is not a primary problem except in minor cases. Many others reported that they were not paid enough to spend the necessary amount of time enforcing the law. Two said that they were forced to attend to their private practice first and to perform their official duties in whatever time was left. Others said that at least the large counties need full time personnel, that they were unprepared in all cases because of the lack of time, that they could not afford to hire many of the needed expert witnesses, that the lack of resources results in many prosecutions being instituted without sufficient evidence, and that the problem is being steadily compounded by the legislative enactment of new laws creating statutory offenses which the county attorney must prosecute.

[10]TABLE 9, *Survey of Practices.*

[11]Jackson, *The Federal Prosecutor*, 31 J. CRIM. L., C. & P.S. 3, 5 (1940).

Other factors such as severity of potential punishment vis-a-vis the particular crime, the prosecutors' highly personalized moral judgments and crowded court dockets dictate that the county attorney be given a wide discretion in the prosecution of crimes.[12]

1. Discretion Not to Prosecute.

The courts of the United States and England generally recognize that the prosecuting attorney has a discretion not to prosecute, which extends beyond any determination of probable cause.[13] The Supreme Court of California has said that the prosecutor "must determine not only whether there has been a violation of law but also whether action is justified under all the facts."[14] This determination must be made in good faith under the circumstances, according to the dictates of his own judgment and according to the established principles of law.[15] Seventy-six per cent of Montana county attorneys feel that a prosecutor, who is reasonably certain that he can prove the commission of a crime and the identity of the criminal, still has the discretion not to prosecute in some circumstances.[16]

Some of the circumstances held by the courts to justify non-prosecution are: the improbability that the action could be successfully terminated;[17] the relative importance to the county of different prosecutions which might be initiated; the existence of a plan of action, formulated in collaboration with police officers, which the prosecutor believes will produce the best law enforcement;[18] the prior confinement of the criminal to a mental institution;[19] and the fact that restitution has been made.[20]

Montana county attorneys listed many more reasons which they felt would tend to justify non-prosecution. The state might be harmed or overburdened by such a prosecution.[21] The interests of the state in a

[12]See Table 1.

[13]United States v. Cox, 342 F.2d 167 (5th Cir. 1965), *cert. denied*, 381 U.S. 935 (1965).

[14]Wilson v. Sharp, 42 Cal. 2d 675, 268 P.2d 1062, 1065 (1954).

[15]State *ex rel.* McKittrick v. Wallach, 353 Mo. 312, 182 S.W.2d 313, 155 A.L.R. 1, 9 (1944); Jones v. District Court, 67 Nev. 404, 219 P.2d 1055 (1950).

[16]Table 8. Whether Montana county attorneys actually have this power under existing Montana law is discussed *infra* at notes 99-105. However, 24% of the county attorneys interviewed said that when there is probable cause, a criminal action must be filed. The most commonly expressed reasons for this attitude were that the county attorney has a duty to enforce the law, not to determine whether it is good or bad; and that the judge should exercise the sole discretion in this area.

[17]Annot., *Duty and Discretion of District Or Prosecuting Attorney As Regards Prosecution of Criminal Offenses*, 155 A.L.R. 10,11 (1945).

[18]*State ex rel. McKittrick v. Wallach, supra* note 17.

[19]State v. LeVien, 44 N.J. 323, 209 A.2d 97 (1965).

[20]Petition of Keefe, 115 Vt. 289, 57 A.2d 657 (1948).

[21]This reason was reported by five county attorneys. Prosecutors said that it is often not desirable to prosecute: if the defendant has escaped from an institution or is wanted in another jurisdiction (mentioned by 3 county attorneys); if the costs of extradition are prohibitive; if the defendant has violated the same law several times (*e.g.* in bad check cases, the defendant will usually be prosecuted only on one count, although several counts might be available to the prosecutor).

prosecution must be balanced against the harm to the particular defendant caused by the prosecution.[22] The detrimental effects on third parties, particularly the victim, must be considered.[23] Even though the defendant is guilty, if local factors would prevent a conviction, it may be that he should not be prosecuted.[24] Since the primary function of law enforcement is to maintain the peace, a literal enforcement of some laws may be inadvisable.[25]

Selective enforcement of the criminal laws presents an opportunity for the exercise of the prosecutor's discretion not to prosecute. From limitations of time and budget, the county attorney is compelled to determine which laws are most socially essential, to be enforced in all cases, and which are to be enforced only selectively. Accordingly, he may make a personal decision that some laws are not necessary, that they are against the best interests of society, or that the people of the community do not wish them enforced. The danger of improperly assuming the function of the legislature thereby is apparent.

The relationship of the various factors involved in selective enforcement are set out in Table Three.[26]

[22]Reported by four county attorneys. One prosecutor said:

> The Les Miserables type of situation or other situation where the effect of prosecution cannot benefit society and will severely damage an individual [must be recognized]. This is not to say that in some instances the individual should not be damaged or ruined, as in the case of a heinous crime, but in dealing with variable factors . . . one must resort to guidelines. The rights of the public, the State, must first be the concern of the prosecutor, but he may take into consideration the damage which the prosecution will do to the defendant, who is a part of the public. The prosecutor may also consider the severity of the crime and the likelihood of conviction and to a lesser extent, the costs involved.

Others said that they take into account similar considerations: whether a prosecution would help either society or the defendant; whether strict enforcement would result in injustice; other factors in the case might inflict a sufficient punishment for the defendant even without prosecution; the motive and character of the defendant might militate against prosecution; and the reputation of juveniles must be protected (mentioned by 5 county attorneys). Two prosecutors said that they would not consider such personal factors in deciding whether to prosecute.

[23]Reported by two county attorneys. *E.g.*, one prosecutor said that in a child molestation case he considered the wishes of the parents and the doctor of the child and let the criminal go free.

[24]Reported by four county attorneys. Some prosecutors indicated that they had filed criminal actions in cases in which there was little or no possibility of obtaining a conviction because they felt that a prosecution, even without a conviction, would constitute some punishment for the crime committed, or because there was some chance that the defendant would plead guilty.

[25]Reported by two county attorneys. One said that the primary function of the office of the county attorney is to keep peace in the community, and that function prevented him from literally interpreting and enforcing the laws of the state. Other prosecutors reported that it is necessary to consider both the importance to society of the law violated and the circumstances of the crime, that jurors often refuse to convict defendants involved in drunken assaults or domestic squabbles, that it is generally not desirable to intervene in family cases (mentioned by 5 county attorneys); nor to prosecute statutory rape cases, or violations of technical criminal statutes such as milk control cases, or violations of certain criminal laws whose basic purpose is to provide an additional remedy for a civil wrong (*e.g.*, fraud and no account check cases—mentioned by 5 county attorneys).

[26]Some additional factors were mentioned by county attorneys during the survey. Laws relating to crimes of violence are to be most strictly enforced. There is a tendency against enforcing some laws because the wrong involved can be better dealt with in a civil action; laws protecting a segment of business; fraudulent check cases in which

Table No. III.

Reasons Given by County Attorneys in "Opinion Questionnaires" for Not Enforcing All Criminal Laws With Equal Diligence.

	Total reports			Size of County: 0 - 9,999 Residents			Size of County: 10,000 or more Residents		
	Rank	No.*	Percent†	Rank	No.	Percent	Rank	No.	Percent
Totals		17	100.0		11	100.0		6	100.0
Certain crimes represent a greater threat to society	1	17	28.1	1	11	29.6	1	6	25.4
Certain old laws are not applicable to modern conditions	2	15	21.2	3	10	19.8	2	5	23.8
The interests of society require that some laws be less strictly enforced	3	14	18.8	2	10	20.2	3	4	16.3
Failure of police and sheriff's office personnel to adequately investigate violations of particular laws	4	11	14.0	4	7	13.1	4	4	15.6
Personal opinion that some laws should not be strictly enforced	5	12	10.4	5	8	11.7	6	4	8.2
Public pressure against the enforcement of certain laws	6	11	7.5	6	7	5.6	5	4	10.7

* This is the number of county attorneys who listed the particular factor involved as a reason for not prosecuting all criminal laws equally.

† The county attorneys were asked to indicate the basic factors, in the order of their importance, which caused them to enforce some criminal laws more diligently than they enforced others. That factor which was noted as being most important was given a weight of six; that which was selected as the second most important was given a weight of five, and so on. The totals were then added for all of the factors. The percent shown above indicates the importance of each factor in relation to the others.

The discretion not to prosecute is frequently exercised. A Los Angeles study found that twenty-five per cent of the cases submitted to the district attorney for prosecution were refused.[27] The *Missouri Crime Survey* indicated that the prosecuting attorney elected not to prosecute 15.6 per cent of the warrants issued.[28] In Montana, 23.5 per cent of the crimes reported to one county attorney during a year by the city police were not prosecuted.[29]

The existence of the power not to prosecute, while necessary, is subject to abuse. This danger, however, could be curtailed to some de-

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the receiver is equally at fault; cases under the non-support laws; and certain laws relating to morals offenses (mentioned by 3 prosecutors). One official suggested that the criminal code should be given more extensive periodical reviews with the object of removing obsolete and unenforceable laws. The obvious problem created by such laws is that they can be, and are, used discriminatorily against members of the public.

[27]Klein, *District Attorney's Discretion Not To Prosecute*, 32 LOS ANGELES B. BULL. 323, 332-333 (1957). The reasons assigned for this failure to prosecute were: "evidence insufficient" (77.3%), "no signature to complaint" (22.1%), "valid defense inherent in facts" (0.4%), "interests of justice" (0.2%). *Id.* at 332.

[28]Missouri Association for Criminal Justice, THE MISSOURI CRIME SURVEY 276 (1926).

[29]TABLE I, *supra*.

gree by the use of a special prosecutor, compensated by public[30] or private funds.[31]

Table No. IV.

Reasons Given in the "Crime Forms" for Exercising Discretion in Favor of the Defendant.*

	Lack of evidence**			Best interests of defendant†			Bargain††			Miscellaneous‡		
	Rank	No.‡‡	Percent§	Rank	No.	Percent	Rank	No.	Percent	Rank	No.	Percent
Totals				2	19	31.1	3	11	17.0	4	8	13.8
Categories of Crimes:	1	22	38.1									
Homicide	1	2	48.2	2	1	25.9	4	0	0.0	2	1	25.9
Felonious theft	1	5	39.3	4	1	7.9	2	5	37.1	3	2	15.7
Sex offenses	2	11	37.2	1	13	43.1	4	3	6.4	3	4	13.3
Miscellaneous crimes	1	4	35.4	2	4	30.4	3	3	25.4	4	1	8.8
Size of Counties in which the cases arose:												
Zero to 9,999 residents	1	14	39.2	2	11	27.4	3	8	19.4	4	5	14.0
10,000 or more residents	2	8	36.3	1	8	37.0	4	3	13.0	3	3	13.7

* Such discretionary acts include decisions not to prosecute, to dismiss, to reduce the charge, to recommend a lighter sentence, and to not charge prior convictions.

** The following reasons given by county attorneys are included in the "Lack of evidence" category: lack proof (mentioned in 14 cases); problems with complaining witness (7); coroner's verdict in favor of defendant (1).

† The following reasons are included in the "Best interests of defendant" category: statutory penalty too harsh for the crime committed (mentioned in 6 cases); best interests of the defendant (9); insanity or low mentality (4).

†† The following reasons are included in the "Bargain" category: compromise for a guilty plea (mentioned in 6 cases); compromise for some other reason (5).

‡ The following reasons are included in the "Miscellaneous" category: problem of supporting dependents of the defendant (mentioned in 2 cases); defendant turned over to other authorities (1); not apprehended (2); pressure from a judge to reduce the charge (1); interests of third parties (2).

‡‡ This figure represents the number of cases in which this factor was listed as a reason for exercising discretion in favor of the defendant.

§ See infra Table No. 7, "Factors Contributing to Decision to Prosecute," note b, for an explanation of this figure.

2. Discretion to Select the Charge

One of the prosecuting attorney's most important functions is to select the charges which he will bring against an offender.[32] A convic-

[30] Revised Codes of Montana, 1947, § 16-1126, authorizes the county commissioners, except in counties of the first class and whenever justice requires it, to employ or authorize the county attorney to employ special counsel to assist in any criminal case pending in the county. *Query,* as to the extent of this authority, and whether the board of county commissioners is the appropriate body to employ it. (Revised Codes of Montana are hereinafter cited R.C.M.)

[31] Montana law permits privately compensated counsel to appear, with the court's consent, and assist the county attorney in the prosecution of criminal cases. *State v. Tighe, infra* note 69. "The fact that counsel appearing to assist a county attorney upon the trial of an action receives compensation from independent sources does not make him a party in interest so it could be charged that he has a financial interest in the prosecution." State v. Moran, 142 Mont. 423, 384 P.2d 777, 788 (1963).

[32] Galbraith v. Lackey, 340 P.2d 497, 502 (Okla. 1959); State v. States, 44 N.J. 285, 208 A.2d 633 (1965).

tion will not be reversed on appeal because the prosecutor failed to charge the defendant with a more serious crime than that actually committed.[33] One court has recognized that a policy against reducing the charge in a case involving a crime of violence, and the prevalence of a particular crime in the county are valid reasons for not reducing the charge.[34] In one Montana county, the charges filed were reduced in thirty-five percent of the felonies prosecuted.[35]

Table No. V.

Statistics on Cases Reported in Crime Forms Involving Both a Charge Reduction and a Guilty Plea by the Defendant.

				Investigation						
	Total cases		Probability of conviction*	County attorney involved	Good	Satisfactory	Poor	Prior convictions	Age**	Personal factor*
	No.	%	mean	%	%	%	%	mean	mean	mean
Totals	17	100.0	2.1	35.2	47.1	47.1	5.8	1.6	3.4	+0.4
Division of cases according to type of crime involved:										
Homicide and sex offenses	8	47.1	2.1	25.0	62.5	25.0	12.5	1.4	3.3	+1.6
Felonious theft and misc. offenses	9	52.9	2.1	44.4	33.3	66.7	0.0	1.9	3.7	−0.8
Division of cases according to the size of the county in which they arose:										
0 to 9,999 residents	12	70.6	2.1	33.3	66.7	33.3	0.0	1.7	3.8	+0.4
10,000 or more residents	5	29.4	2.2	40.0	0.0	80.0	20.0	1.4	3.0	+0.2

* See Table 2, Docket Study Based on Crime Forms, for an explanation of this factor.

** See Table 6, Statistics on Sentence Recommendations, for an explanation.

3. Discretion to Recommend Sentence

Montana is not among the few states which give the prosecutor the statutory duty of assisting the judge in the determination of the sentence. However, most judges ask the prosecutors for their recommendations, and such recommendations may be given a great deal of weight. In some instances the prosecutor can almost guarantee a defendant the

[33] State *ex rel.* Ronan v. Stevens, 93 Ariz. 375, 381 P.2d 100 (1963).

[34] *Ibid.*

[35] Table 1. 17.7% of the cases examined during this study involved both a charge reduction and a guilty plea by the defendant. Table 5.

sentence he will receive.[36] The Alabama Supreme Court has held that a judge has no right to keep from the jury a sentence recommendation based upon prosecutor's prior agreement with the defendant.[37]

Eighteen per cent of the crimes studied by this survey involved both a sentence recommendation by the county attorney and a guilty plea by the defendant. One county attorney indicated that the court's determination of sentence should be based to a larger extent upon the prosecutor's recommendation. He felt that the county attorney knows more about the crime and the defendant than does the judge. However, four other county attorneys said that the determination of sentence is a completely judicial function in which the prosecutor should have no voice.

The practice of sentence recommendation, because it is subject to the scrutiny of the court, is preferable to the practice of charge reduction prior to the filing of the information. The latter practice might be decreased if district judges would give more weight to the prosecutor's sentence recommendations.[38]

[36]Nedrud, *supra* note 4, at 164. But the mere fact that a state court chooses not to follow the recommendation is not grounds for federal habeas corpus relief—even though the defendant may have pleaded guilty in consideration of the prosecutor's promise to recommend a lighter sentence. Lakas v. Wilson, Warden, 364 F.2d 905 (9 Cir. 1966).

[37]*Ex parte* State *ex rel.* Bailes, 235 Ala. 133, 177 So. 752 (1937).

[38]See Note, 112 U. PA. L. REV. 865, 866 (1964). Of course, the practice of charge reduction might be preferable in the situation where the charge could be reduced from a felony to a misdemeanor.

Table No. VI.

Statistics on Cases Reported in Crime Forms Involving Both a Sentence Recommendation by the County Attorney to the Court and a Guilty Plea by the Defendant.

	Total cases		Probability of conviction*	Investigation				Court followed recommendation	Prior convictions	Age**	Personal factor
				County attorney involved	Good	Satisfactory	Poor				
	No.	%	mean	%	%	%	%	%	mean	mean	mean
Totals	18	100.0	2.1	16.7	50.0	44.4	5.6	94.4	1.0	2.9	+0.1
Division of cases according to nature of recommendation made by county attorney:											
Leniency	6	33.3	1.8	0.0	83.3	16.7	0.0	100.0	0.7	3.2	−1.6
Delay execution	10	55.6	2.4	30.0	20.0	70.0	10.0	90.0	0.9	3.0	+1.2
Defer imposition	2	11.1	1.0	0.0	100.0	0.0	0.0	100.0	2.5	2.0	0.0
Division of cases according to type of crime involved:											
Homicide and sex offenses	6	33.3	1.7	16.7	66.7	33.3	0.0	83.3	0.2	2.8	−0.2
Felonious theft and miscellaneous offenses	12	66.7	2.0	16.7	41.7	50.0	8.4	100.0	1.5	3.0	+0.2
Division of cases according to the size of the county in which they arose:											
0 to 9,999 residents	6	33.3	1.6	0.0	100.0	0.0	0.0	100.0	0.7	3.0	−1.3
10,000 or more residents	12	66.7	2.3	25.0	25.0	66.6	8.4	91.7	1.2	2.9	+0.8

* See Table 2, Docket Study Based on Crime Forms, for an explanation.

** To facilitate calculation, the age of each subject of a crime form was ranked on the following scale: 0-18 (1); 19-21 (2); 22-30 (3); 31-65 (4); 66 or older (5). Thus, a mean age of 2.9 would indicate the average age of the group to be about 29 years, and 3.2 would indicate an average age of about 37 years.

4. Discretion to Bargain for a Plea of Guilty

The decision to accept a plea of guilty in a particular case is largely that of the prosecutor.[39] He may secure a guilty plea by promising to reduce the charge, recommend a lighter sentence, not charge prior convictions, or drop other charges. Perhaps the most common form of bargaining involves no promises by the prosecutor at all. The county attorney merely lets the defendant or his attorney know that if the case goes to trial, he will "throw the book" at the defendant and push for the most severe sentence possible.[40]

[39] A.B.A. Commission on Organized Crime, I Organized Crime and Law Enforcement 223 (1952). In People v. Henzey, 24 App.Div.2d 764, 263 N.Y.S.2d 678, 679 (1965), the court held that "It was within the District Attorney's discretion to refuse to recommend the acceptance of lesser pleas if all the defendants did not plead guilty to lesser crimes."

[40] This fact was mentioned by 5 county attorneys.

The Fifth Circuit has held that a plea of guilty given in response to a prosecutor's promise of leniency is involuntary, and that a conviction based upon such a plea must be set aside.[41] However, there is no evidence that this holding has curtailed the bargaining practices of prosecuting attorneys in the United States.

Montana statutes specifically allow the "compromise" of a misdemeanor if the injured party has a civil remedy,[42] and if he acknowledges to the court that he has received satisfaction. The court has discretionary power to stay the proceedings in such a case.[43] Another statute provides that: "No public offense can be compromised . . . except as provided" by the procedure set forth above.[44] No Montana Supreme Court case has held that this provision prevents bargaining for a plea of guilty. Apparently Montana county attorneys do not regard this statute as greatly restricting their discretion.[45] Eighty-eight per cent of those interviewed in the Montana survey indicated that they do some plea bargaining.[46] This figure is much higher among the county attorneys from the larger counties. Seventy-three per cent of the guilty pleas entered in Montana result from bargains between the defendant and the county attorney.[47]

The criminal cases studied in Tables Fourteen through Sixteen show that there is a greater probability of a bargain being made in cases arising in the larger counties. They also indicate that a bargain is more than twice as likely if the case involves a felonious theft than if it involves a homicide or a sex offense. Various personal characteristics of defendants

[41]Shelton v. United States, 342 F.2d 101, 113 (5th Cir. 1957). The court held that where the plea of guilty was given in reliance on a promise that the sentence would be less than one year; and where the trial court failed to ascertain whether the plea was voluntary, the conviction must be set aside. The fact that the prosecutor's promise had been kept was said to be immaterial. A vigorous dissent stated that there was no authority for the holding of this case:

> A correct statement of the applicable rule might be: a plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats, . . . misrepresentation, . . . or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business. *Id.* at 115.

See also Elksnis v. Gilligan, 34 U.S.L. WEEK 1197, 2705-06 (S.D.N.Y. June 13, 1966), in which the court held that a guilty plea premised upon a judge's promise of a definite sentence is involuntary. The court reasoned that the exalted position of the judge exerts too much influence upon the decision of the defendant; and that a judge who is a party to such an arrangement can not properly perform his function of deciding the validity of the plea. This decision does not condemn the normal bargaining process between the prosecutor and the accused. The court said that voluntary, as distinguished from coercive, bargaining between the prosecutor and the defendant "has been sanctioned by propriety and practice—in some measure they deal at arm's length."

[42]R.C.M. 1947, § 94-9401.

[43]R.C.M. 1947, § 94-9402.

[44]R.C.M. 1947, § 94-9403.

[45]One official suggested that these statutes should be construed as not limiting the county attorney, but rather as providing a means for the defendant to secure a dismissal.

[46]These attorneys indicated that they engage in bargaining practices in 51% of the cases handled by them. The percentage of cases in which the county attorney attempts to bargain is more than twice as great in the larger counties than it is in the smaller counties. TABLE 9.

[47]TABLE 9.

are also important in determining whether a bargain will be achieved in a particular case. Comparing residents of the county with non-residents, a resident is almost twice as likely to bargain in a case involving a small offense, but less than half as likely to bargain when the charge is for a homicide or a sex offense. The resident is slightly less likely to bargain in a small county, but almost three times as likely to bargain in a large county. Defendants with more skilled occupations are less likely to bargain in minor offenses than unskilled or unemployed defendants, but more likely in the more serious offenses. Those with skilled occupations are less likely to bargain in the small counties but more likely in the larger counties. Defendants who are less than twenty-one years old bargain a little less than older defendants in minor offenses, but substantially more in serious offenses. The defendant with a prior felony record is almost twice as likely to bargain as a defendant with no record. The propensity to bargain increases in cases involving less serious crimes.

Many county attorneys who were interviewed indicated that they determine to some extent what type of bargain to make with a defendant by evaluating various personal factors.[48] Others said that the type of crime committed is the most important element behind their determination of whether to bargain.[49] Bargaining is difficult in a few Montana counties where the district judges disapprove of the practice.

The procurement of a guilty plea saves the county the cost of what may be a long and expensive trial.[50] It also allows a county attorney to convict offenders even though he lacks the time and assistants to adequately investigate and prosecute the cases.[51] However, because of the strong bargaining position of the prosecutor, the defendant may be at a great psychological disadvantage. This is especially true where the defendant is not represented by counsel and where he is not a professional or an habitual criminal.[52] Further, to the extent that a lesser sentence accompanies the plea of guilty, the deterrent effect of penal sanctions is reduced. Moreover, acceptance of the plea leaves little on the record for public scrutiny and is rarely subject to review by a higher court; but it

[48]Reported by eight county attorneys. Prosecutors said that they look first to the interests of the state, including the seriousness of the offense and the weight of the evidence, and second to the interests of the defendant (mentioned by 2 prosecutors); that they give special consideration to young first offenders (3) and to defendants with a family; that they frequently reduce the charge to make the punishment fit the crime; and that they will not bargain with a defendant who has a record. Two other county attorneys said that they do not generally consider personal factors.

[49]Three prosecutors said that they do not bargain in cases involving very serious crimes, or crimes of violence. Two others indicated that there is little bargaining done in misdemeanor prosecutions.

[50]Mentioned by 3 county attorneys.

[51]Reported by 6 county attorneys. One said that he will bluff in many cases where he lacks sufficient evidence to procure a conviction. Another does not bargain if he has a good case.

[52]Three county attorneys said that they bargain directly with defendants who do not have counsel in misdemeanor cases. Two others said that they bargain with defendants in felony cases before counsel is appointed. However, three other prosecutors indicated that they bargain only with defense counsel.

builds a high record of convictions to exhibit to that element of the community which insists on strict enforcement of the law.[53]

Several states have attempted to limit the possibility of abuse by requiring that the prosecutor submit to the court a written statement of his reasons for recommending acceptance of a plea to a lesser charge.[54] The court is then required to examine the circumstances of the case and determine the propriety of the particular bargain.[55] Such provisions have been unsuccessful because "courts are largely dependent for information upon prosecuting attorneys and are in no position to be effective in supervising the taking of pleas."[56]

More effective supervision of this area than that provided by case law might be effected by legislation imposing on district judges the duty to determine in some detail the voluntariness of a plea of guilty before accepting it. A codified questioning procedure, sufficient to ascertain in greater depth the reasons behind the entry of the plea, would better serve to protect the interests of both the defendant and the state. The Criminal Law Commission has made at least some progress in this regard by proposing that: "The court may refuse to accept a plea of guilty and shall not accept the plea of guilty without first determining that the plea is voluntary with an understanding of the charge."[57]

The criminal defendant in Montana is given additional protection by being able to move for withdrawal of a guilty plea at any time before judgment.[58] The statute allowing withdrawal has been construed by the Montana Supreme Court to authorize withdrawal of a plea of guilty

[53]Note, 103 U. PA. L. REV. 1057, 1070-71 (1955). One prosecutor said that he dislikes trying bad cases because if he does not maintain a good conviction record, many defendants will refuse to bargain with him. They would rather take their chances at a trial.

[54]See N.Y. CODE CRIM. PRO. § 342a; and MINN. STAT. ANN. § 630.30 (1947).

[55]Note, *supra* note 38, at 893.

[56]A.B.A. COMMISSION ON ORGANIZED CRIME, *op. cit. supra* note 39.

[57]MONT. PROPOSED R. CRIM. PRO. § 95-1606(5). MONT. PROPOSED R. CRIM. PRO. § 95-1902(b) would require that before acceptance of the plea, the court must inform the defendant of the consequences of the plea and of the maximum penalty possible.

Many county attorneys interviewed during this study said that they were opposed to any statute which might lead to formal judicial inquiries into the bargains arrived at between defendant and prosecutor. Nine county attorneys said that such a statute is unnecessary because the courts at the present time are informally advised of the nature of most bargains. Others felt that this provision would be harmful because it would tie up procedure, limit the county attorneys' bargaining power, and raise a separation of powers problem. One prosecutor said that because of the unsettled state of federal law regarding the propriety of bargaining, it is undesirable to have anything in the record concerning the bargain.

[58]R.C.M. 1947, § 94-6803. The trial courts' discretion to deny such a motion is given a broad construction by appellate courts. In United States v. Colonna, 142 F.2d 210 (3rd Cir. 1944), the court sustained the denial of a motion to withdraw a guilty plea before sentencing. It said:

> The cases uniformly hold that motions to withdraw a plea of guilty should be denied where the plea of guilty was entered either by the defendant or his counsel in his presence, and if the defendant knew and understood what was being done and there was not present any circumstances of force, mistake, misapprehension, fear, inadvertence or ignorance of his rights and understanding of the consequences of the plea.

But see State v. Nicholas, 46 Mont. 470, 128 Pac. 542 (1912), where the court held that the trial court abused its discretion in not granting the motion to withdraw a plea of guilty.

even *after* judgment.[59] The Montana Proposed Rules of Criminal Procedure would codify this interpretation.[60]

5. Discretion to Request That the Court Dismiss the Action

The Montana county attorney's power to enter a *nolle prosequi* has been abolished by statute;[61] but district courts have the discretion to dismiss an action upon the application of the county attorney.[62] Federal prosecuting attorneys are subject to a similar rule.[63] In practice this provision does not greatly limit a prosecutor's ability to dismiss an action. Since a court has no power to force a county attorney to *diligently* prosecute a case which he desires to dismiss, it must, as a practical matter, accept his recommendation in nearly all cases.[64] A statute allowing the district court to disqualify the county attorney and to appoint a special prosecutor would be desirable.[65]

Once a prosecution has been commenced, it should be vigorously pursued unless the state cannot produce sufficient evidence, or has other good reasons for not trying the case.[66] In one Montana county 62.1 per cent of the cases in which informations were filed were dismissed upon the recommendation of the county attorney.[67] The high percentage of dismissals is a further indication that the county attorney lacks the time and manpower to adequately prepare the state's case: "The more highly efficient the preparatory steps and preliminary stages, the less likely will be the necessity of trying cases against innocent men or ill-prepared cases against guilty ones. Consequently, a high percentage of cases which fail at various stages is an indication of something wrong in earlier stages."[68]

[59]State *ex rel.* Foot v. District Court, 81 Mont. 495, 263 Pac. 979 (1928).

[60]Mont. Proposed R. Crim. Pro. § 95-1902(c). In their comment on this section the Criminal Law Commission said that "A change of plea should ordinarily be permitted if it fairly appears that the defendant was in ignorance of his rights and of the consequences of his act, if influenced unduly and improperly either by hope or by fear in making it, or it appears that the plea was entered under some mistake or misapprehension. . . ."

[61]R.C.M. 1947, § 94-9506. This section would be repealed by the adoption of Mont. Proposed R. Crim. Pro. § 95-1303. However, under the Proposed Rules, the county attorney must still secure permission of the court before dismissing an action.

[62]R.C.M. 1947, §§ 94-6206, 94-9505. (Mont. Proposed R. Crim. Pro. §§ 95-1303, 95-1703).

[63]Fed. R. Crim. P. 48a.

[64]Wickersham Commission, Report on Prosecution 98.

[65]The courts may have this power even without a special statute. See Clyde v. Lauder, 11 N.D. 136, 90 N.W. 564 (1902).

[66]*Galbraith v. Lackey, supra* note 32, at 502. A Philadelphia study found that the most common reasons behind the entry of a *nolle prosequi* were: prosecuting witness dead, 1.3%; technical reasons, 2.8%; not sufficient evidence, 5.9%; miscellaneous, 9.2%; lack of prosecution, 26.1%; prosecution withdrawn, 31.5%; no reasons given, 23.3%. Note, *supra* note 53, at 1068.

[67]Table 1.

[68]Bettman, *Prosecution*, II Criminal Justice in Cleveland 89 (The Cleveland Foundation, 1922).

6. Discretion to Obtain the Assistance of a Special Prosecutor

A county attorney who lacks the time or the experience to adequately prepare an important criminal case can secure the aid of a special prosecutor.[69] A board of county commissioners has the power, except in counties of the first class, "whenever, in its judgment, the ends of justice or the interests of the county require it, to employ, or authorize the county attorney to employ special counsel to assist in the prosecution of any criminal case. . . ."[70] The county attorney may, without such order, "appoint as many deputies as may be necessary for the faithful and prompt discharge of the duties of his office."[71] However, no compensation will be allowed for such appointees.[72] Thus, even though there is no order of record appointing the special prosecutor, the defendant may not complain unless the special prosecutor is guilty of prejudicial conduct.[73]

Such a special prosecutor may perform most of the duties of the regular prosecuting attorney; but there is authority that, in the absence of necessity, he may not represent the prosecuting attorney before the grand jury.[74] In *State ex rel. Porter v. District Court,* a special prosecutor was appointed by both the county attorney and by the court to take the place of the county attorney before the grand jury.[75] The court found that there was no evidence of incapacity or disqualification on the part

[69]In State v. O'Brien, 35 Mont. 482, 90 Pac. 514, 519 (1907), an attorney was employed by the county commissioners to assist the county attorney in the trial of a criminal case. The trial court then made a formal order appointing the special prosecutor. The Montana Supreme Court stated that the formal order was not necessary, since the county attorney had not objected to the appointment. The court went on to say that,

> [I]t was proper for the county attorney to have the assistance of counsel, though he was employed and paid by private parties. The members of the community do not lose interest in the prosecution of criminals when they elect an officer whose duty it is to prosecute them; nor do they surrender their right to employ all just and proper means to see that the rights of the state are preserved. When the exigencies of the case demand it, as when the public prosecutor is without experience or incompetent, or is confronted by an array of able and talented counsel who appear for the defendant, in a difficult and complicated case, the interests of the state demand that he have assistance. In all such cases it is within the discretion of the court to appoint counsel to assist, or to permit counsel employed by private parties, or even volunteers, to appear for that purpose. The defendant is entitled to a fair and impartial trial, but nothing more.

See also State v. Whitworth, 26 Mont. 107, 66 Pac. 748 (1901); and State v. Tighe, 27 Mont. 327, 71 Pac. 3 (1903).

[70]R.C.M. 1947, § 16-1126. Even before the enactment of this statute, the Montana Supreme Court held "that counsel employed and compensated by private persons may, with the court's consent, assist in the prosecution of criminal cases." *State v. Tighe, supra* note 69, at 6.

[71]R.C.M. 1947, § 16-2409. See State v. Crouch, 70 Mont. 551, 227 Pac. 818 (1924).

[72]R.C.M. 1947, § 16-2409.

[73]State v. Cockrell, 131 Mont. 254, 309 P.2d 316 (1957).

[74]"He may have been rightfully appointed by the court and fully qualified as a special prosecutor to assist the state's attorney in the preparation and trial of the case; but that does not qualify him to appear before the grand jury." State v. Johnson, 55 N.D. 437, 214 N.W. 39, 41 (1927); People v. Schannell, 36 Misc. 40, 72 N.Y.S. 449, 450 (1901). But see Raymond v. People, 2 Colo. App. 329, 30 Pac. 504, 511 (1892); and State v. Tyler, 122 Iowa 125, 97 N.W. 983 (1904).

[75]135 Mont. 238, 339 P.2d 1035 (1959).

of the county attorney which would justify the appointment.[76] It held that the indictment rendered by the grand jury must be set aside.[77]

If the Montana Proposed Code of Criminal Procedure is adopted, the Porter case will be to some extent legislatively overruled. The proposed Code authorizes the county attorney or the attorney general, when so requested by the grand jury, to employ special counsel "whose duty it shall be to investigate and present the evidence" to the grand jury.[78]

LIMITATIONS ON THE PROSECUTOR'S DISCRETION

1. Duties of the County Attorney[79]

> So in Montana . . . the county attorney is a public officer, a part of the judicial system, vested with power over the criminal prosecutions in his county and as such officer responsible to the people for the performance of the duties entrusted to him.[80]

A. *Duty to Investigate*

The prosecuting attorney is under obligation to conduct investigations of public offenses.[81] The Revised Codes of Montana state that "The county attorney of the proper county must inquire into and make full examination of all facts and circumstances, touching the commission of any public offense, whenever the offender has been held to answer. . . ."[82] He must also investigate "alleged" violations of the law.[83] When the prosecutor is informed that a crime has been committed, even though no complaint has been filed, he must inquire into the facts.[84] New Jersey has held that only a credible allegation of crime will create a duty to investigate.[85]

[76] "The duty of the county attorney to advise and meet with the grand jury when one is called is a duty that he must carry out if he is able and not disqualified, regardless of the press of business in his office." *Id.* at 1051. "[T]he decisions disclose that in the cases where the appointment of a special prosecutor was upheld, the regular prosecutor had admitted disqualification or incapacity." *People v. Scannell, supra* note 74. Similarly, in Territory v. Harding, 6 Mont. 323, 12 Pac. 750 (1887), the Montana court held that a court has the implied power to appoint an attorney to represent the territory before a grand jury "when the necessity arises, and the district attorney is absent or disqualified and the law fails to provide for such an emergency. . . ."

[77] This decision was based on two Montana statutes, R.C.M. 1947, §§ 94-6324, 94-6601, which provide that the judge, only when his advice is asked, and the county attorney may be present when the jury is considering a charge; and that if an unauthorized person is present the indictment must be set aside.

[78] Mont. Proposed R. Crim. Pro., § 95-1406(c).

[79] The Mont. Const., art. 8, § 19, provides that the county attorney "shall perform such duties as are required by law."

[80] State *ex rel.* Porter v. District Court, 124 Mont. 249, 220 P.2d 1035, 1048 (1950).

[81] Wilbur v. Howard, 70 F. Supp. 930, 935 (E.D. Ky. 1947). The prosecutor may interrogate those who have knowledge, although he has no power to subpoena testimony. State v. Eisenstein, 16 N.J. Super. 8, 83 A.2d 777 (1951).

[82] R.C.M. 1947, § 94-6205.

[83] State *ex rel.* Juhl v. District Court, 107 Mont. 309, 84 P.2d 979, 981 (1938).

[84] Adams v. State, 202 Miss. 68, 30 So. 2d 593, 596 (1947).

[85] State v. Winne, 27 N.J. Super 304, 99 A.2d 368, 372 (1953). The court said that "If the complaint is embodied in a letter written by a reputable citizen, it may well be the duty of the prosecutor to make some investigation. An anonymous telephone call, giving no details of the alleged corruption could probably be disregarded."

The duty to investigate will arise, even if the county attorney is not informed of the offense by another, if he has personal knowledge that an offense has been committed.[86] This is implicit in a Montana statute requiring that the county attorney "institute proceedings before magistrates for the arrest of persons charged with or *reasonably suspected* of public offenses, when he has information that such offenses have been committed. . . ."[87] (Emphasis supplied.) The Oregon Supreme Court has stated that, "While the law does not impose the duties of a detective upon a prosecuting attorney, it does impose upon him ordinary diligence in discovering and abating crime."[88] Thus, if a county attorney acquires knowledge of a crime, by any means, he must investigate.[89] Ninety per cent of Montana county attorneys feel that they have a duty to investigate the facts of a reported or suspected crime.[90]

Investigation is required not only preparatory to the decision to file an information, but also for the proper prosecution of a case. The American Bar Association Commission on Organized Crime has stated: "Adequate preparation frequently involves the making of investigations, the calling and examination of additional witnesses, the checking on particular aspects of a case. . . . [T]he prosecutor may be called upon to make investigations because of the ineffectiveness and rudimentary character of the police organization."[91]

Montana prosecutors have indicated that a substantial portion of the time spent in the preparation of a case for trial is devoted to an investigation of the facts involved. County attorneys in counties with more than 10,000 people use about twenty-nine per cent of their time conducting investigations; and those from smaller counties spend about eleven per cent of their time on investigations.[92] Prosecutors participated in the investigations in thirty-two per cent of the cases examined during this survey in which a completed trial was held.[93]

The county attorney is forced to spend such a large portion of his time on investigation because of the inadequacies of local law enforcement agencies. Two county attorneys indicated that a prosecutor who

[86]State *ex rel.* McKittrick v. Wymore, 345 Mo. 169, 132 S.W.2d 979 (1939).

[87]R.C.M. 1947, § 16-3101(2).

[88]State v. Langley, 214 Ore. 445, 323 P.2d 301, 308 (1958); *Adams v. State , supra* note 84.

[89]A prosecutor must investigate into notorious offenses. State *ex rel.* Coleman v. Trinkle, 70 Kans. 396, 78 Pac. 854 (1904).

[90]TABLE 8. There are remarkable differences of opinion between prosecutors concerning when this duty to investigate arises. Various county attorneys listed the following situations in which they would have a personal duty to investigate: where the accused is a person of good reputation (mentioned by 2 county attorneys); all substantial reports of crimes (4); any serious crime reliably reported (6); whenever necessary to obtain evidence (2); whenever the investigative agencies neglect their duty, or lack sufficient knowledge of the law, or skill (13); where reports of a crime persist after refusal by the investigative agency to investigate; where the investigating agent is a friend of the suspect; where public feling is aroused; "Big" crimes (8); when public officials are reported or suspected (3).

[91]A.B.A. COMMISSION ON ORGANIZED CRIME, *op. cit. supra* note 39, at 246, 247, 252.

[92]TABLE 9.

[93]TABLE 11.

works with and educates local law enforcement officials has excellent success. Four other county attorneys complained that investigative personnel lack any effective understanding of the rules of evidence.[94] Table 9 shows that cooperation between the county attorney's office and the various law enforcement agencies is rated as poor in twenty-three per cent of the counties; and that there is much less cooperation in the larger counties than in the smaller ones. The investigations were poorly conducted in only nine per cent of the cases reported by county attorneys.[95] They were more poorly conducted in the cases involving less serious offenses and in the cases reported from the larger counties.[96]

Because the prosecutor lacks the training and the time required to conduct effective investigations, some improvement in the investigative machinery must be initiated.[97] The local law enforcement agencies should be upgraded and better trained. In addition, four prosecutors from large counties said that they needed specially trained investigative assistants on their staffs. Three other county attorneys indicated that they would be interested in sharing an investigative assistant with one or more adjacent counties.[98]

Another partial solution to the problem might be achieved through an expansion of the existing office of the state investigator. Problems of geography and finances would probably prevent this office from becoming large enough to assist the county attorney in cases other than the most complicated. However, three prosecutors indicated that this office could be helpful in difficult cases, especially those involving fraud, because the local police do not understand the evidence needed and the attorney general lacks the budget and personnel to help. Four county attorneys felt that the office of the state investigator could be of great value if it contained a modern crime laboratory. Some reservations were expressed because local agencies might resent the state prosecutor's involvement in local investigations and not give full cooperation. But one prosecutor felt that the state investigator would get better cooperation from the police than would an investigative assistant atached to the county attorney's staff.

[94]Other county attorneys made the following complaints concerning their local police and sheriff's departments: They are not good investigators and not interested in learning; The state conducts excellent police training schools, but the salaries are too low to attract men who will benefit sufficiently; The police and sheriffs' departments fail to co-operate; The county attorney has a duty to serve as a buffer between the police and the courts, weeding out cases which do not deserve to be prosecuted—but he is forced to prosecute some poor cases to keep the police happy.

[95]TABLE 11.

[96]TABLES 13-16.

[97]Eleven county attorneys indicated that they are prevented from enforcing particular criminal laws by the failure of the police and sheriff's office personnel to investigate violations of these laws. Whatever the legal merit of this claim, it does tend to emphasize the seriousness of the investigative problem in Montana.

[98]Two county attorneys said that it would not be practical to divide the services of an investigative assistant between counties because the county in which he lived would get most of the benefits. Two other prosecutors expressed doubts concerning the desirability of such an assistant. They felt that there would be danger of harmful competition developing between the assistant and the local police and sheriff's departments.

B. *Duty to Prosecute.*

The sequel to the county attorney's duty to investigate is his duty to prosecute.[99] Prosecutions must be commenced upon indictments found by a grand jury,[100] unless the district court orders that the action be dismissed.[101] If the county attorney fails to sign an indictment, the judge may require him to do so.[102]

The duty to prosecute arises, even though no indictment has been found or complaint filed, if the county attorney knows or has reason to suspect that an offense has been committed. He is included within the terms of a general Montana statute which provides that, "Every person who has reason to believe that a public offense has been committed and that a certain person has committed such offense, must make complaint of such person."[103] Another Montana statute specifically requires that the county attorney institute proceedings against those "reasonably suspected of public offenses."[104] He must diligently prosecute persons whom he knows, or of whom he has been informed, or has reasonable cause to believe to be violators of the Montana gambling statutes.[105]

The county attorney must diligently prosecute every case, but in so doing, he may not deprive the defendant of a fair trial.[106] The prosecutor is bound by a higher duty of fairness than is the ordinary practitioner of the law.[107] As a representative of all the people, he has "a heavy obligation to the accused."[108] Because the state is as interested in the acquittal of the innocent as it is in the conviction of the guilty, the prosecuting attorney must present all available evidence tending to aid in the ascertainment of the truth;[109] and he must refrain from making inflammatory comments.[110]

[99]The duty to prosecute is not absolute. See *supra* notes 13-31.

[100]R.C.M. 1947, § 94-6333 (MONT. PROPOSED R. CRIM. PRO. § 95-1410(f)).

[101]R.C.M. 1947, § 94-9505.

[102]R.C.M. 1947, § 94-6333. Under the Proposed Rules the county attorney's signature is apparently not required on the indictment. MONT. PROPOSED R. CRIM. PRO., Title 95, ch. 14; and § 95-1503(e). Accordingly, the Proposed Rules contain no provision similar to that in R.C.M. 1947, § 94-6333. This is contrary to the rule in the federal courts. The federal prosecuting attorney can refuse to sign a grand jury indictment, and he can refuse to prepare indictments which he is unwilling to sign. He cannot be placed in contempt for these actions. United States v. Cox, 342 F.2d 167, 176 (5th Cir. 1965), *cert. denied,* 381 U.S. 935 (1965).

[103]R.C.M. 1947, § 94-5802.

[104]R.C.M. 1947, § 16-3101(2).

[105]R.C.M. 1947, § 94-2414.

[106]State v. Coursolle, 255 Minn. 384, 97 N.W.2d 472, 75 A.L.R.2d 755, 760 (1959).

[107]People v. Carr, 63 Cal. App. 2d 568, 329 P.2d 746 (1958).

[108]Ginsberg v. United States, 257 F.2d 950, 70 A.L.R.2d 548, 554 (5th Cir. 1958).

[109]Stull v. People, 140 Colo. 278, 344 P.2d 455, 457 (1959). In Newton v. State, 178 So. 2d 341, 344 (Fla. 1965), the court said that the prosecuting attorney "is a public officer and holder of a quasi-judicial position. As such, he is charged with the duty of assisting the courts in seeing that justice is done by endeavoring to ascertain the true facts whether they lead to conviction or acquittal." The district attorney may not knowingly use false evidence to obtain a conviction. Napue v. Illinois, 360 U.S. 264, 269 (1958).

[110]*People v. Carr, supra* note 107.

Table No. VII

Basic Factors Indicated by County Attorneys to Have Contributed to Their Decisions to Prosecute in the Particular Cases Reported on the "Crime Forms."

	Total cases		Seriousness of the offense			Strength of the evidence			Protect society by isolation of offender			Character of offender			Set example			Desire to punish			Rehabilitation		
	No.	Percent	Rank	No.*	Percent‡	Rank	No.	Percent	Rank	No.	Percent	Rank	No.	Percent	Rank	No.	Percent	Rank	No.	Percent	Rank	No.	Percent
Totals	65	100.0	1	58	28.2	2	53	23.1	3	35	12.5	4	33	12.1	5	37	10.7	6	31	8.8	7	25	4.6
Categories of crimes:																							
Homicide	19	29.2	1	18	27.8	2	18	22.8	3	12	14.0	4	11	11.8	5	14	11.1	6	10	7.5	7	10	5.0
Felonious theft	18	27.7	1	16	27.2	2	16	24.4	4	11	11.8	3	12	16.2	6	8	7.2	5	8	7.2	7	7	6.0
Sex offenses	18	27.7	1	16	31.2	2	12	22.6	3	9	14.3	4	7	11.0	6	8	8.6	5	7	9.2	7	5	3.1
Miscellaneous crimes	10	15.4	1	8	25.8	2	7	22.2	5	3	7.6	6	3	6.6	3	7	20.2	4	6	14.1	7	3	3.5
Size of counties in which cases arose:																							
Zero to 9,999 residents	33	50.8	1	30	28.5	2	29	23.9	3	19	14.0	4	16	10.7	5	17	9.5	6	15	9.3	7	11	4.1
10,000 or more residents	32	49.2	1	28	27.9	2	24	22.3	5	16	11.0	3	17	13.6	4	20	11.9	6	16	8.3	7	14	5.0

* This number represents the number of cases in which this factor was listed as a reason for commencing prosecution.

‡ The county attorneys were asked to indicate the basic factors, in the order of their importance, which contributed to their decision to prosecute each case reported in the crime forms. That factor which a crime form noted as being most important was given a weight of seven; that which was selected as the second most important was given a weight of six, and so on. The totals were then added for each category of cases. The percent shown above indicates the importance of each factor as compared with the other six factors in the group of cases under consideration.

2. CONTROL BY THE COURTS.

As a general rule, courts cannot force the prosecuting attorney to institute criminal proceedings.[111] The county attorney's good faith discretion not to prosecute overrides his general duty to prosecute all criminal violations coming to his attention.[112] A Montana court would probably reach the same result.[113]

Montana courts have broader powers to dismiss criminal actions than they have to compel prosecutions. Unless good cause to the contrary is shown, judges must dismiss actions in which an information has not been filed within thirty days after a person has been held to answer for a crime, or in which the defendant is not brought to trial within six months after the finding of the indictment, or the filing of the information.[114] A court, upon its own motion "in the furtherance of justice," may order an action, information, or indictment to be dismissed.[115] Except as provided by statute, however, a court has no power to dismiss a good information or indictment over the protests of the prosecuting attorney.[116] A dismissal not based upon a statute exceeds the jurisdiction of the court, and may be attacked by a writ of certiorari.[117]

While the court may dismiss an action, it has no power to alter the charge which the prosecutor chooses to file against the defendant.[118] The prosecuting attorney may bring a writ of prohibition to prevent a judge from proceeding in an action in which he has changed the charge.[119]

[111]Six out of twenty-six Montana county attorneys said that they had at some time been forced, directly or indirectly, to institute a prosecution. TABLE 9.

[112]In Leone v. Fanelli, 194 Misc. 826, 87 N.Y.S.2d 850 (1949), an application for an order compelling a prosecuting attorney to prosecute specific crimes was denied, because prosecution is discretionary and may not be judicially compelled.

[113]The Vermont court has held that a writ of prohibition, instituted by a private citizen, may not be used to force a prosecutor to institute a criminal proceeding on the ground that his actions raise no jurisdictional question. Gould v. Parker, 114 Vt. 186, 42 A.2d 416 (1949). But see People *ex rel.* Luetje v. Ketcham, 45 Misc. 2d 802, 257 N.Y.S.2d 681 (1965), where the court held that as a quasi-judicial officer, the prosecuting attorney may be prohibited, pursuant to New York statute, from proceeding in a matter over which he has no jurisdiction. The Maryland Supreme Court has held that a writ of mandamus will similarly not lie to compel the prosecution of an action. Unless grossly abused, "when an act rests by statute in the discretion of a person or depends upon personal judgment, the writ of mandamus will not lie. . . ." Brack v. Wells, 184 Md. 86, 40 A.2d 319, 321, 156 A.L.R. 324, 326 (1944).

A Montana statute creates what could be a very broad exception to the general rule. "If an offense is committeed during the sitting of the court, after the discharge of a grand jury, the court may, in its discretion, require the county attorney to file an information, ..." R.C.M. 1947, § 94-6315. It is submitted that this statute could be used in almost any situation to justify a court order requiring prosecution. However, research does not disclose that it has ever been so used. The Criminal Law Commission has decided that "this section was no longer needed" and suggested that it be repealed. Comment, MONT. PROPOSED R. CRIM. PRO. § 95-1410.

[114]R.C.M. 1947, § 94-9501.

[115]R.C.M. 1947, § 94-9505 (MONT. PROPOSED R. CRIM. PRO. § 95-1703). See State *ex rel.* Anderson v. Gile, 119 Mont. 182, 172 P.2d 583, 585 (1946). Such an order would be appealable by the state under MONT. PROPOSED R. CRIM. PRO. § 95-2403(b)(1).

[116]State *ex rel.* Ronan v. Stevens, 93 Ariz. 375, 381 P.2d 100, 102 (1963).

[117]*Ibid.*

[118]Nevertheless, 2 out of 20 county attorneys said that judges had forced them to change the charge which they had filed against defendants.

[119]State *ex rel.* Dowd v. Nangle, 365 Mo. 134, 276 S.W.2d 135 (1955). The court held that a judge may not act unless there is a statute giving him that power.

A court can, in some circumstances, appoint a special prosecuting attorney who either assists the regular prosecutor,[120] or replaces him.[121] A Montana statute requires that the court appoint an attorney to perform the duties of the county attorney when the county attorney fails to attend at the trial.[122] An early Montana case held that the district court has the "inherent right" under the common law to appoint a special district attorney when the regular district attorney is absent or disqualified.[123] More recently, the Montana Supreme Court upheld the appointment of a special prosecutor in an action conducted against the regular county attorney.[124]

Indiana has held that a court has the "inherent power" to appoint a special prosecutor "when necessary to prevent a failure of justice."[125] Other courts have said that a special prosecutor may be appointed where it is established that the prosecuting attorney is an interested party or is otherwise clearly incapacitated;[126] where he is unable to attend to the duties of his office or is disqualified;[127] and where the judge disagrees with the prosecuting attorney's reasons for not prosecuting a case further.[128]

In spite of this broad language, the actual holdings allowing the replacement of the prosecuting attorney by a special prosecutor generally involve cases in which the regular prosecutor was absent or incapacitated, or in which the action is against the prosecuting attorney or someone closely related to him either personally or financially. There would be a substantial possibility of reversal if a district court attempted to replace a county attorney because it disagreed with his reasons for not instituting an action, for filing a particular charge, or for taking a plea of guilty to a lesser offense. "Judges and courts may not substitute their discretion for that of the prosecuting attorney. Inquisitorial powers are vested in the office of the prosecutor and in grand juries, and not in

[120]In State v. Biggs, 45 Mont. 400, 123 Pac. 410, 411 (1912), an attorney was permitted by the trial court to appear as "associate counsel for the state", over the objections of both the defendant and the county attorney. The Montana Supreme Court held that "it was within the discretion of the trial judge to permit him to appear and take part, whether he was employed by persons interested in the prosecution or appeared as a volunteer; and since it is not shown that he was guilty of any conduct which prevented the defendant from having a fair trial, the defendant cannot be heard to complain."

[121]*State v. Cockrell, supra* note 73. See also Nedrud, *The Role of the Prosecutor in Criminal Procedure,* 32 U. Mo. at Kansas City L. Rev. 142, 169 (1964).

[122]R.C.M. 1947, § 94-7239 (Mont. Proposed R. Crim. Pro. § 95-1903). The special prosecutor need not be chosen from the local attorneys. State *ex rel.* McGrade v. District Court, 52 Mont. 371, 374, 375, 157 Pac. 1157 (1916).

[123]Territory v. Harding, 6 Mont. 323, 12 Pac. 750 (1887). The case cited no authority for its holding.

[124]*State ex rel. McGrade v. District Court, supra* note 122.

[125]State *ex rel.* Williams v. State, 188 Ind. 283, 123 N.E. 209, 215 (1916). The case involved a criminal prosecution against the assistant prosecuting attorney.

[126]State *ex rel.* Spencer v. Criminal Court, 214 Ind. 551, 15 N.E.2d 1020 (1938).

[127]Lizar v. State, 82 Okla. Crim. 56, 166 P.2d 119 (1946). The court said that it had the "inherent power" to appoint a special prosecutor in these circumstances even in the absence of statute.

[128]State ex rel. Clyde v. Lauder, 31 S.D. 136, 90 N.W. 564 (1902).

judges and courts."[129] Thus, a judge may not appoint a special prosecutor because he feels that the case would be better prosecuted by him. The Indiana Supreme Court has stated that a special prosecutor may not be appointed over the objections of the regular prosecuting attorney, "without a judicial determination of the fact of disqualification or interest after an opportunity for the regular prosecutor to be heard."[130]

The narrow range of case decisions in this area tends to indicate that the district courts are unsure of the scope of the "inherent right." Enactment of a new statute might be desirable to give the right some definition. The statute should generally specify that a district court may appoint a special prosecutor, upon a showing that the county attorney is absent, incapacitated, or disqualified. In addition, the statute should make clear that the county attorney may be disqualified if there is a showing of either corruption or interest. Where the county attorney has abused his discretion not to prosecute, the appointment of a special prosecuor would be an appropriate remedy. Two instances where this might arise are when the county attorney unwarrantedly fails to file an information after a complaint has been entered or dismisses the action after filing the information. Further, the statute should provide that a district court may order the county treasurer to pay the special prosecutor, or allow private sources to provide his compensation.

3. Control by the Attorney General

The original American prosecuting system was highly centralized. Each of the original colonies had an attorney general and as the population increased, local assistants were established to represent the state in court. These local officials became independent in most of the states and popular election finally marked their extreme "democratization."[131] Courts have interpreted and applied very broadly specific statutory grants of power to the attorney general, and it has been held that the attorney general enjoys not only those powers given to him by statute or the constitution but also any other powers which may have pertained to the office under the common law.[132]

In Montana, as in most other states, the attorney general has wide supervisory powers over the prosecuting attorney.[133] Montana statutes provide that it is the duty of the attorney general "to exercise supervisory powers over county attorneys in all matters pertaining to the

[129]*State ex rel. Spencer v. Criminal Court, supra* note 126, at 1022, 1023.

[130]*Ibid.* See this case for further citations.

[131]Lashley, *Preparation and Presentation of the States Case,* Missouri Crime Survey 114 (Missouri Association for Criminal Justice, 1926). See also, DeLong, *Powers and Duties of the State Attorney General in Criminal Prosecutions,* 25 J. Crim. L., C. & P.S. 358, 372 (1934). See People v. Miner, 2 Lans. 396, 398 (N.Y. 1868); and State v. Warren, 180 So.2d 293, 299 (Mo. 1965).

[132]DeLong, *supra* note 131 at 361.

[133]A.B.A. Commission on Organized Crime, I Organized Crime and Law Enforcement 238-241 (1952).

duties of their offices;"[134] and it is the duty of the county attorney:

> When ordered or directed by the attorney general so to do, to promptly institute and diligently prosecute in the proper court, and in the name of the state of Montana, any criminal or civil action or special proceeding, it being hereby declared that the supervisory powers granted the attorney general . . . include the power to order and direct said county attorneys in all matters pertaining to the duties of their office.[135]

The Montana Supreme Court in *State ex rel. Nolan v. District Court* said that the attorney general could direct "the pleadings to be relied on, or the line of argument to be pursued, and the general conduct of the trial, even though such course conflicts with the county attorney's wishes."[136]

In addition to his supervisory control, the attorney general also has the statutory duty to assist the county attorney in the discharge of his duties when requested by the county attorney, required by the public service, or directed by the governor.[137] The *Nolan* case held that when an emergency arises calling the attorney general to the assistance of the county attorney, he necessarily has the authority to do anything that the inferior officer may do, or, if the circumstances require it, undo what has already been done.[138]

Thus, the attorney general is given the power to substitute his discretion for that of the county attorney in all areas of a county attorney's work. The American Bar Association Commission on Organized Crime, however, found that:

> Apart from intervention in emergency situations the local prosecutor is usually left severely alone by the attorney general or the governor. He administers his office as he sees fit without oversight of supervision. The attorney general may regard himself as the chief law officer of the state. The statutes and the cases may have given him broad powers over the prosecution of crime. But by and large throughout the country, the attorney general of the various states is not an important factor in connection with the ordinary processes of criminal justice.[139]

The power to conduct criminal prosecutions is politically distasteful to an elected attorney general, especially "when the power must be exercised over the heads of jealous local prosecutors."[140] Statutory provisions, such as that of Montana giving the attorney general supervisory control over county attorneys, although construed liberally by the courts, have little effect.[141]

The fundamental proposition underlying the policy of the Montana Attorney General in these matters seems to be that the county attorney is the chief prosecutor and is to be left alone as much as possible. For

[134] R.C.M. 1947, § 82-401(5).
[135] R.C.M. 1947, § 16-3101(8).
[136] 22 Mont. 25, 55 Pac. 916, 917 (1899).
[137] R.C.M. 1947, § 82-401(6) and (7).
[138] *Supra* note 136, at 917, 918.
[139] *Op. cit. supra* note 133, at 244.
[140] DeLong, *supra* note 131, at 372.
[141] Willoughby, Principles of Judicial Administration 121 (1929).

this and for economic reasons, requests by county attorneys for special prosecutors or for trial assistance are generally denied. The office of the attorney general has occasionally helped to prepare gambling cases and has prosecuted a few gambling cases itself, and would probably provide research or trial assistance in a very complicated case—but these are exceptions. The policy of the office relating to matters coming within the scope of its supervisory powers is similar. When a complaint is received by the attorney general concerning a county attorney, the complaint is forwarded to the county attorney involved who may either correct the matter or inform the attorney general of his reasons for not doing so. If the attorney general disagrees with the prosecutor's reasons and requests that specific action be taken, the county attorney who fails to comply runs the risk that the attorney general will take direct action. However, it is unlikely that the attorney general will act contrary to the wishes of the county attorney unless the county attorney's conduct has geen generally unpopular; and it is even more unlikely that the attorney general will attempt to remove the county attorney from office unless there is clear evidence of corruption. The real power of the attorney general would appear to be in his ability to influence public opinion against a county attorney who fails to comply with his requests.[142]

Montana county attorneys are in general agreement with the policies of the attorney general. Only three out of twenty-five prosecutors questioned felt that he did not sufficiently exercise his supervisory powers. Several county attorneys felt that the attorney general should extend more assistance to them. Two county attorneys said that assistance by the attorney general in criminal prosecutions is generally undesirable because of the danger that it will prejudice the state's case in the minds of jurors. Other prosecutors said that the attorney general enforces adequate minimum standards for county attorneys, that any greater exercise of the supervisory powers would cost more than it would accomplish, and that most of the problems are local in nature which can better be dealt with by the county attorney than by the attorney general. However, a few prosecutors felt that the attorney general should act more affirmatively to ensure that the vice laws are enforced.[143]

4. Control by Public Pressure

Many county attorneys questioned during this survey indicated that by far the most effective mechanism for controlling abuses of discretion is the requirement that county attorneys be elected. One prosecutor said that more active supervision by the attorney general might reduce abuses of discretion; however, it appears that the tried and proven democratic

[142]The information in the preceeding paragraph was obtained in interviews with county attorneys and members of the Attorney General's staff.

[143]Two county attorneys said that they could not, by themselves, go against public pressure for the nonenforcement of such laws, but that they could if the attorney general were strongly behind them. Another said that the present lack of uniform enforcement of vice laws causes too much pressure to be brought against the county attorney who does enforce them to go along with those who do not.

system of control by vote of the people adequately controls the prosecutor's discretion.

County attorneys listed other reasons why public opinion is generally helpful in criminal prosecutions: Enforcement should be tied to the consensus of the community; the public has a sense of basic fairness; the county attorney should always be in a position to support to the public his decisions as to prosecution or non-prosecution of cases.

Many other county attorneys have found that public pressure is generally harmful. Eleven prosecutors indicated that public pressure prevented them from enforcing certain criminal laws.[144] Some said that this pressure is often misguided: The public has neither accurate knowledge of all the facts in a particular crime, nor an understanding of the relevant law;[145] the public is even less aware of the facts of cases in large counties; and the public occasionally wants a sacrificial goat without caring whether he is guilty. Most pressure is either for non-prosecution, or for severe prosecution in connection with sensational crimes. Prosecutors reported that much of this pressure is the result of undesirable publicity: Pressure groups spread half-truths seeking either severe prosecution or no prosecution; news releases are often prematurely given by investigative agencies, rather than by the county attorney after completing his investigation. Such pressure can force the county attorney to make the wrong decisions in his handling of criminal cases. When his reputation is at stake, he may not prosecute if there is a chance that he will lose at trial. He may be required to choose between acting in accord with the desires of the public, and standing by his own convictions.[146]

County attorneys also made some suggestions for reducing the harmful effects of public pressure: Establish better relations with the press; reduce newspaper coverage before trial; educate the public more fully concerning the responsibilities of the prosecutor; change the manner of selecting county attorneys from elective to appointive; give the county attorney a lifetime tenure similar to that enjoyed by federal judges.

More county attorneys felt public pressure to be beneficial than felt it to be harmful. However, it is interesting to note that county attorneys from the larger counties of the state were much more unhappy about public pressure than were the prosecutors from the smaller counties.[147]

Public pressure bears a clear relationship to the outcome of criminal cases. Out of all the cases examined during this survey in which a

[144]TABLE 3.

[145]This reason was noted by 7 county attorneys.

[146]However, one public official expressed the opinion that the individual county attorney has the ability to control, to some extent, the amount and the effect of public opinion. For example, a county attorney may implement a prior decision not to prosecute through the use of a coroner's jury or a preliminary hearing. This device will enable him to dispense with prosecution in an instance where this course of action would otherwise result in popular dissatisfaction. The official also noted that some county attorneys may tend to exaggerate public opinion as an excuse for inactivity.

[147]See TABLE 8.

sentence of probation was imposed, thirty per cent of the defendants had pressure in favor of them and only twelve per cent had pressure against them. On the other hand, twenty per cent of those sentenced to prison had pressure against them, and only ten per cent had pressure for them.[148] The outcome of the cases seems to be more in accord with public sentiment in the smaller counties than in the larger counties.[149]

The cases studied also indicate that public pressure is applied in a discriminatory manner. The professional people, the highly intelligent, and the defendants who were tried in their home counties received more pressure for them and less against them than did the unemployed defendants, the defendants of average intelligence, and the transients.[150]

In some cases public pressure can operate to prevent abuses of prosecutorial discretion and to cause the prosecutor to enforce the law; but it is equally likely to force the prosecutor to abuse his discretion and to prevent him from enforcing unpopular laws. In many cases, segments of public pressure are pushing in both directions—with the hapless county attorney caught in the middle. It is submitted that the effect of public pressure on the discretion of the prosecutor should be decreased; and a system of more constant, immediate and effective controls be devised to prevent abuses of discretion.

SANCTIONS

1. Removal

The county attorney may be removed from office upon a showing of misconduct, malfeasance or nonfeasance. The Constitution and the Revised Codes of Montana provide that officers not subject to impeachment may be removed for misconduct or malfeasance.[151] Under provisions similar to those of Montana, the Nevada Supreme Court has held that to warrant removal, the malfeasance charged must be connected with the performance of official duties; and that there must be a showing of scienter.[152] Scienter may be proved by circumstantial evidence.[153] The procedure of removal for misconduct or malfeasance is commenced by the grand jury filing a written accusation[154] with the district court which "must thereupon appoint someone to act as prosecuting officer in the matter, ..."[155]

A general Montana statute provides for the removal of a county

[148]Table 12.

[149]Tables 15 and 16.

[150]Table 12.

[151]Art. V, § 18. See also R.C.M. 1947, § 94-5501.

[152]Jones v. District Court, 67 Nev. 404, 219 P.2d 1055 (1950). Thus, even though the prosecutor had negligently accused the sheriff of burglary, he could not be removed for malfeasance.

[153]State *ex rel.* McKittrick v. Graves, 346 Mo. 490, 144 S.W.2d 91 (1940).

[154]R.C.M. 1947, § 94-5502.

[155]R.C.M. 1947, § 94-5503.

attorney when he "has wilfully refused or neglected to perform the official duties pertaining to his office."[156] Special statutes provide that the failure of the county attorney to prosecute those whom he "has reasonable cause to believe to be" violators of the gambling statutes, shall be sufficient cause for removal from office;[157] and that if the prosecutor fails to file an information within thirty days after a person has been examined and committed or released on bail, he may be prosecuted for neglect of duty.[158] Statutes such as these are commonly construed in favor of the prosecuting attorney. So long as he acts in good faith, his discretionary decision not to prosecute will not be grounds for removal.[159] Even though another attorney might have reached a different conclusion about prosecuting or continuing to prosecute, this does not show dereliction.[160] Here, again, there must be scienter. Evidence of the notoriety of the violations has been held admissible to prove that the prosecuting attorney had knowledge of them.[161] A proceeding for the removal of a county attorney guilty of nonfeasance may be commenced by any person upon the filing of his verified written accusation with the district court.[162] The Montana Supreme Court has held that this proceeding is in the nature of a criminal action, and therefore the district court may appoint a special prosecutor.[163]

Despite the broad language of the removal statutes, they are largely ineffective to control abuses of discretion by a prosecutor.[164] "The district attorney need fear ouster only for criminal activity, and even where evidence of such conduct exists, ouster proceedings are seldom employed."[165]

2. Criminal Prosecution.

A second sanction which may be imposed by the state upon a prosecutor who fails to properly perform his duties is a criminal prosecution. Prosecuting attorneys are seldom made liable to criminal penalties for actions in the course of official duties except in connection with the nonenforcement of particular laws. In Montana, a county attorney who refuses or neglects to perform any of his duties under the gambling laws, is guilty of a misdemeanor and liable to a fine of not less than $100 nor

[156]R.C.M. 1947, § 94-5516.

[157]R.C.M. 1947, § 94-2414.

[158]R.C.M. 1947, § 94-6204.

[159]Coleman v. Trinkle, 70 Kans. 396, 78 Pac. 854, 855 (1904). See discussion *supra* at notes 13-31. In *Jones v. District Court, supra* note 152, at 1058, the court stated that "the wide discretion vested in prosecuting attorneys with reference to the prosecution of parties for crimes must be exercised in good faith, and is not an arbitrary discretion."

[160]State *ex rel.* McKittrick v. Wallach, 353 Mo. 312, 182 S.W.2d 313, 155 A.L.R. 1 (1944). The court did not allow removal because it found a good faith attempt to enforce the gambling laws as well as possible.

[161]State *ex rel.* McKittrick v. Wymore, 345 Mo. 169, 132 S.W.2d 979 (1939).

[162]R.C.M. 1947, § 94-5516.

[163]*State ex rel. McGrade v. District Court, supra* note 122, at 373.

[164]Nedrud, *supra* note 121, at 169.

[165]Note, 65 YALE L. J. 209, 211, 212 (1955). See for extensive authority there cited.

more than $3,000, or imprisonment for not less than six months nor more than one year.[166] This statute does not specify that a violation must be either malicious or willful. The New Jersey Supreme Court has held that in the absence of a statute requiring wilful or malicious misconduct, it is not necessary to charge corruption in an indictment against the prosecuting attorney.[167] However, it is necessary to prove that the prosecuting attorney had knowledge of the commission of the offense.[168] Even though the prosecutor may not know the identity of the offender, if he knows of the offense his duty to investigate requires that he attempt to discover his identity and conduct a prosecution.[169] One case has held that when a violation of a gambling statute is punishable as a felony, a prosecuting attorney who indicted gambling offenders for a misdemeanor is himself subject to criminal penalties.[170]

3. Disbarment.

A county attorney guilty of a serious abuse of discretion is also subject to disbarment. The North Dakota Supreme Court suspended a prosecuting attorney from the practice of law for failing to prosecute gambling and liquor law violations.[171] The court said that "any deviation from the line of proper deportment in the office of state's attorney is equally a deviation from the line of proper deportment as an attorney at law."[172] A state prosecuting attorney who fails to adequately perform the duties of his office may be disbarred from practice before a federal court.[173] However, since proof of corrupt motive is not essential to the conviction of a prosecutor for criminal nonfeasance, the mere fact of such conviction does not require disbarment.[174]

4. Private Suit.

A prosecuting attorney is a quasi-judicial officer. As such, he is generally held not to be liable in a private tort suit for acts and omissions within the scope of his official duties.[175] The concept of judicial

[166]R.C.M. 1947, § 94-2416. A conviction under this section also results in an automatic forfeiture of office.

[167]State v. Winne, 12 N.J. 152, 96 A.2d 63, 75 (1953). This case involved a charge of criminal nonfeasance in connection with extensive and notorious gambling conducted in the defendant's jurisdiction. This holding is contrary to an eariler holding of the New Jersey courts in the same matter. State v. Winne, 21 N.J. Super. 180, 91 A.2d 65, (1952).

[168]*State v. Winne, supra* note 167, 96 A.2d 63. This may be proved by evidence showing the violations to be notorious.

[169]State v. Langley, 214 Ore. 445, 323 P.2d 301, 307 (1958).

[170]Speer v. State, 130 Ark. 457, 198 S.W. 113 (1917).

[171]*In re* Voss, 11 N.D. 540, 90 N.W. 15 (1902).

[172]*Id.* at 21.

[173]Wilbur v. Howard, 70 F. Supp. 930 (E.D. Ky. 1947). See this case for citations to other cases allowing the disbarment of prosecuting attorneys.

[174]*In re* Langley, 217 Ore. 45, 341 P.2d 538 (1959) (remanded to a bar association committee to determine if there had been corruption).

[175]See generally 3 Davis, Administrative Law, ch. 26 (1958). However, two special Montana statutes, relating to Justices' and Police Court proceedings, provide that upon the acquittal of the defendant, if the court certify that the prosecution was

immunity was developed at the common law "to preserve the integrity and independence of the judiciary and to insure that judges will act upon their convictions free from the apprehension of possible consequences."[176] In *Cooley on Torts* it is stated that:

> Whenever . . . the state confers judicial powers upon an individual, it confers them with full immunity from private suits. . . . [H]e is to exercise his judgment fully, freely and without favor and he may exercise it without fear; that the duties concern individuals but they concern more especially the welfare of the State. . . . The rule thus laid down applies to large classes of offices. . . .[177]

The office of the prosecuting attorney is included within the scope of this rule.[178] A leading California case, *Pearson v. Reed,* stated:

> A prosecutor is called upon to determine, upon evidence submitted to him, whether a criminal offense has been committed by the person accused—exactly the same question that is presented to a court or jury upon trial. His decision is no less judicial in character if it be erroneous or swayed by prejudice or malice.[179]

The court reasoned that society is adequately protected because the prosecuting attorney may be punished criminally or removed from office if he acts corruptly, or fails to faithfully discharge the duties of his office.[180]

The immunity of the prosecutor from a private action for damages is not absolute. Courts have variously restricted this immunity to quasi-judicial acts,[181] or to acts done within the scope of the prosecutor's juris-

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malicious or without probable cause, it may order the "prosecutor" to pay the costs of the action. R.C.M. 1947, §§ 94-100-29, 94-100-30. These sections could be held to apply to county attorneys.

[176]Gammel v. Ernst, 245 Minn. 249, 72 N.W.2d 364, 368 (1955); Bradley v. Fisher, 80 U.S. 335 (1871). The Ninth circuit in Robichaud v. Ronan, 351 F.2d 533, 535-36 (1965), said that

> The arguments generally advanced in support of immunity are, "(1) the danger of influencing public officials by threat of a law suit; (2) the deterrent effect of potential liability on men who are considering entering public life; (3) the drain on the valuable time of the official caused by insubstantial suits; (4) the unfairness of subjecting officials to liability for the acts of their subordinates; (5) the theory that the official owes a duty to the public and not to the individual; (6) the feeling that the ballot and the formal removal proceeding are far more appropriate ways to enforce the honesty and efficiency of public officers." Comment, 66 Harv. L. Rev. 1285, 1295, n.54 (1953).

[177]2 COOLEY, TORTS 795 (3d Ed. 1906). This rule works a hardship on a few individuals, but it is for the benefit of the whole of society. Pearson v. Reed, 6 Cal. App. 2d 277, 44 P.2d 592 (1935).

[178]Baker, *The Prosecuting Attorney,* 26 J. CRIM. L., C. & P.S. 647, 652, 665 (1936). Public welfare requires that a prosecutor's discretionary decisions be made free from fear of civil liability. Wilson v. Sharp, 42 Cal. 2d 675, 268 P.2d 1062 (1954).

[179]*Pearson v. Reed, supra* note 177, at 596, 597.

[180]Watts v. Gerkins, 111 Ore. 641, 228 Pac. 135, 140 (1924); 2 COOLEY, *op. cit. supra* note 177. In Lusk v. Hanrahan, 244 F. Supp. 539, 540 (E.D. Ill. 1965), the court said in dicta that "Any impropriety committed by a prosecuting attorney that interferes with an accused's constitutional right to a fair and impartial trial may be remedied in the criminal proceeding against the accused. Although the official may be immune to civil tort liability, he may nevertheless be subject to discipline and and professional censure where warranted."

[181]*Robichaud v. Ronan, supra* note 176, at 536-37, involved a suit against a county attorney and his deputy under the Civil Rights Acts; Act of April 20, 1871, 17 Stat. 13, 42 U.S.C. § 1983; Act of April 9, 1866, 14 Stat. 27, Act of May 31, 1870, 16 Stat. 144, 42 U.S.C. § 1988. The court there held that

diction,[182] authority,[183] powers,[184] or official capacity.[185] Chief Justice Hand, writing for the Second Circuit Court of Appeals, said that a dishonest exercise of discretion will not necessarily destroy the immunity; but that "What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him."[186] In *Spalding v. Villas,* the United States Supreme Court ruled that a public officer is not liable for instituting a prosecution, although he acts with malice and without probable cause, provided the matters acted upon are among those generally committed by law to the control of the office in question and are not manifestly or palpably beyond the authority of such office.[187] A more recent federal decision has held that a prosecuting attorney, who acts outside the scope of his jurisdiction and without authorization of law,

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> [W]hen a prosecuting attorney acts in some capacity other than his quasi-judicial capacity, then the reason for his immunity—integral relationship between his acts and the judicial process—ceases to exist. . . . If they . . . committed acts, or authoritatively directed the commission of acts, which ordinarily are related to police activity as opposed to judicial activity, then the cloak of immunity should not protect them.

See also Lewis v. Brautigam, 227 F.2d 124, 55 A.L.R.2d 505 (5th Cir. 1955) But see Gaitor v. Strauss, 249 F. Supp. 923, 930-31 (W.D. Pa. 1966), and cases there cited. The court stated in dicta that the activities of an assistant United States District Attorney in interrogating a suspect were privileged since they were performed in his official capacity.

The restriction of immunity by the *Robichaud* case to quasi-judicial functions is contrary to the general rule relating to government officials. The general rule extends immunity to acts of officials done "within the outer perimeter of [their] line of duty", Barr v. Matteo, 360 U.S. 564, 575 (1959). The rule of the *Robichaud* case, if given general extension, would completely destroy the immunity of many government officials who have no quasi-judicial duties. Even restricted to prosecuting attorneys, the *Robichaud* rule is illogical. A prosecutor's duty to investigate is as great as is his duty to prosecute. See *supra,* notes 55-60 and text. No reason can justify giving a prosecuting attorney immunity for acts done within the scope of his duty to prosecute and denying it to him for acts done within the scope of his duty to investigate.

The Ninth Circuit has itself expressed dissatisfaction with this portion of the *Robichaud* decision. In S. & S. Logging v. Barker 366 F.2d 617, 620 n.2 (9th Cir. 1966). Judge Pope, referring to *Robichaud,* stated:

> In its general discussion of the immunity rule, the court assumed that the immunity was related to acts 'committed by the officer in the performance of an integral part of the judicial process.' This apparent assumption that the immunity is so limited was unnecessary to that decision, and it must have been inadvertent for it is plainly contrary to the statements quoted above from Barr v. Matteo and O'Campo v. Hardisty [262 F.2d 621, 625] and contrary to the other cases listed in Norton v. McShane, supra [332 F.2d 855, 859].

[182]Kenney v. Fox, 232 F.2d 288 (6th Cir. 1956).

[183]*Watts v. Gerkins, supra* note 180.

[184]Gregoire v. Biddle, 177 F.2d 579 (2nd Cir. 1949), *cert. denied,* 339 U.S. 949 (1950).

[185]Anderson v. Rahrer, 3 F. Supp. 367 (S.D. Fla. 1933). "The latest authorities on the question . . . uniformly agree that prosecuting attorneys are not liable in a civil action for malicious prosecution where they act in their official capacity, even though they act with malice and without probable cause." Annot.: *Immunity of prosecuting officer from action for malicious prosecution.* 118 A.L.R. 1450 (1939).

[186]*Gregoire v. Biddle, supra* note 184, at 581.

[187]161 U.S. 483 (1896). See also Creelman v. Svenning, 410 P.2d 606 (Wash. 1966).

cannot shelter himself from liability by the plea that he is acting under color of office.[188]

In spite of this broad immunity, individuals do occasionally bring actions against a prosecuting attorney under the Civil Rights Acts, for malicious prosecution and for false imprisonment.[189] Courts often state that an action for malicious prosecution is not a favorite of the law because public policy requires the prosecution of crimes.[190] If the prosecutor acted within the scope of his official duties, he will not be held liable for malicious prosecution even though the plaintiff can prove both malice and lack of probable cause.[191] The same rules apply in an action for false imprisonment against the prosecuting attorney.[192] However, the doctrine of immunity may be more narrowly construed in an action for damages brought against the prosecutor under the Civil Rights Act.[193]

POSSIBLE STATUTORY CHANGES IN THE CONTROL AND SUPERVISION OF THE COUNTY ATTORNEY'S DISCRETION

The foregoing discussion indicates that, even though the county attorney has been given explicit statutory duties and the courts and the attorney general have broadly construed powers of supervision and control, these powers are seldom exercised in the absence of clear evidence of a corrupt exercise of discretion.[194] Under present statutes, county attorneys who are not corrupt will not be required to enforce the law. This, in effect, gives the prosecutor the suspending power sought by the Stuart kings,[195] and denied to them by the English Bill of Rights: "The pretended suspending of laws, or the execution of laws, without consent of Parliament, is illegal."[196]

[188]*Lewis v. Brautigan, supra* note 181, involved a state prosecuting attorney who hid the plaintiff from his counsel to extort a confession. The court refused a motion to dismiss in a civil action for conspiracy to interfere with civil rights under the Civil Rights Act, *supra* note 181. The doctrine of immunity may be given a more limited application in suits under the Civil Rights Acts than it has been given at the common law. Norton v. McShane, 332 F.2d 855 (5th Cir. 1964), *cert. denied*, 380 U.S. 981 (1965). Nevertheless it is a deciding factor in many suits brought under the Civil Rights Acts.

[189]The court in Kittler v. Kelsch, 56 N.D. 227, 216 N.W. 898, 56 A.L.R. 1217, 1219, 1222 (1927), said that an action for false imprisonment lies where the defendant does an act which, upon the stating of it, is manifestly illegal; while malicious prosecution is for a prosecution which, upon the stating of it, is manifestly legal. A sufficient judicial warrant takes away from an imprisonment the essential element of illegality, if it is wrongfully obtained, malicious prosecution lies. If an officer acts entirely without jurisdiction he is liable, but if there is a question of jurisdiction then he is not liable even though he should decide wrongly in holding that he had jurisdiction when in fact he had none.

[190]*Watts v. Gerkins, supra* note 180, at 137.

[191]*Norton v. McShane, supra* note 188, at 860; Mitchelle v. Steele, 39 Wash. 2d 473, 236 P.2d 349 (1951); *Pearson v. Reed, supra* note 177; White v. Brinkman, 23 Cal. App. 2d 307, 73 P.2d 254 (1937).

[192]Price v. Cook, 120 Okla. 1105, 250 Pac. 519 (1926). In Downey v. Allen, 36 Cal. App. 2d 269, 97 P.2d 515 (1939), the court used language supporting the general rule, but also found that there was probable cause, and no evidence of malice.

[193]See *supra*, note 188.

[194]See Note, 65 YALE L. J. 209, 211, 212 (1955).

[195]MAITLAND, THE CONSTITUTIONAL LAW OF ENGLAND 188, 302-306.

Some increase in the control of the district courts over the discretion exercised by county attorneys is desirable. A statute should provide that a plea of guilty may not be entered except with the approval of the court, to be given only after the court has inquired into the circumstances surrounding the plea.[197] Courts should also be given broader powers to appoint special prosecuting attorneys in certain cases;[198] and thus to allow the private prosecution of a criminal action where the court feels such an action to be justified.[199]

However, increases in the courts' control over prosecutorial discretion should be limited to the specific areas outlined above. They should not be given broad supervisory powers enabling them to overrule any discretionary decision of the county attorney with which they might disagree. Such a grant of power would make the judge, in effect, the chief prosecutor, thereby violating the principle of separation of powers upon which our system of criminal justice is predicated.[200]

Because the courts should be given only a limited amount of control over the discretion exercised by county attorneys, it will be necessary to centralize the administration of criminal prosecutions to significantly reduce the opportunities for abuse of discretion. The objectives of centralization are an increase in the quality of prosecuting attorneys together with an increase in control over their actions. The concept of state departments of justice was devised to meet these objectives, and first proposed by the American Bar Association in 1934.[201] Departments of Justice have since been established in eight states.[202] Section Five of the Model Department of Justice Act provides that the department shall be headed either by the attorney general or by a director appointed by the governor.[203] Section Seven of the Act requires that the attorney general advise and assist prosecuting attorneys upon their request, and supersede the prosecuting attorneys either when so requested by the governor or grand jury, or when the attorney general feels that such a course will further the best interests of the state. This section also provides that the attorney general shall have all of the powers of the prosecuting attor-

[197]See text *supra* between notes 53 and 57.

[198]See discussion of such a statute *supra* in the text beginning at note 130.

[199]See textual discussion *supra* beginning at note 30. Only 3 out of 25 county attorneys favored giving the courts these broad powers to appoint special prosecutors. Three county attorneys said that to give the courts this authority would create a "separation of powers problem"—a judge who instituted a prosecution would be committed to obtaining a conviction. Others said that: Courts are less responsive to the will of the people; The courts have sufficient control now because the prosecutor who has a civil practice is forced to maintain the good will of the judge; Such an enactment is unnecessary because the courts can remove county attorneys by existing procedures, and because county attorneys prosecute all cases which warrant prosecution; Some judges would be likely to abuse this power.

[200]United States v. Cox, 342 F.2d 167 (5th Cir. 1965).

[201]59 REPORTS OF THE AMERICAN BAR ASSOCIATION 124 (1934).

[202]A.B.A. COMMISSION ON ORGANIZED CRIME, II ORGANIZED CRIME AND LAW ENFORCEMENT 104 (1953), says that Departments of Justice exist in California, Iowa, Nebraska, New Mexico, North Carolina, Oregon, and Pennsylvania.

[203]*Id.* at 104, 105.

ney when he so relieves or assists him.[204] Section Eight allows the governor to appoint a special assistant attorney general if the attorney general refuses the governor's request to intervene in an action.[205] Section Nine provides for the removal of the prosecuting attorney if required for the public good.[206]

The enactment of the Model Department of Justice Act in Montana might improve the administration of criminal justice. However, it is submitted that the Model Act does not go far enough. Section Seven, which "is the heart of the Model Act"[207] would probably give the attorney general no more extensive powers or duties than those which he has under present Montana law.[208] Section Eight of the Act may be desirable, but it is open to question whether an elected governor would take action contrary to the wishes of both the attorney general and a county attorney. Section Nine is also theoretically meritorious, but there is no reason to assume that it would be employed more often than Montana's existing removal provisions. The Act would do nothing to improve the quality of county attorneys and it would do little to increase control over them.

A significant reduction of the possibilities for abuse of the prosecutor's discretion cannot be achieved without substantially revising the administration of criminal prosecutions. A prosecuting attorney must be given extensive discretion in the conduct of his duties. However, an increase in the quality of prosecuting attorneys should result in a corresponding decrease in abuses of discretion. Since one of the most serious problems in Montana is that many county attorneys lack the time to adequately perform all of their duties, an improvement in quality could be achieved by the establishment of a system of state's attorneys to deal solely with the prosecution of felonies. County attorneys would retain their duties of prosecuting misdemeanors and handling county civil business. This would bring the functions of the county attorney in line with his salary which is computed on the basis of part-time employment. The adoption of such a system would permit the assignment of a state's attorney to each judicial district to prosecute all felonies occurring therein. By providing the office with a salary comparable to that of a district judge, more competent attorneys could be attracted to the position. A good salary would also justify a requirement that the state's attorney devote full time to his duties and not engage in a civil practice; and it would incline the state's attorney to run the office as a career position, allowing him to become more proficient in his duties.

The state's attorneys, at least in the larger districts, would have to hire assistants to adequately fulfill their functions. If there is more than one large county in a district, the assistant might reside and work in a

[204] *Id.* at 107-109.
[205] *Id.* at 118.
[206] *Id.* at 119-120.
[207] *Id.* at 109.
[208] See textual discussion beginning at note 131, *supra.*

county different from that of the state's attorney.[209] This system would also make feasible the employment of full-time investigative officers. Such officers are greatly needed now, but few counties are large enough to afford them. Since the jurisdiction of the state's attorney would be more extensive, the hiring of a competently trained investigative officer would be economically justifiable in several districts.

State's attorneys could be either elected or appointed.[210] If the office were elective the problem of lack of control over exercises of discretion, now encountered in connection with county attorneys, would remain. The American Bar Association Commission on Organized Crime has recommended the appointment of local prosecutors in order to concentrate responsibility and to take control away from local political machines. Appointments might be made by either the governor or the attorney general.[211] The appointment system would provide the state's attorney with a degree of immunity from public pressure for the nonenforcement of certain laws. This immunity could be strengthened by making the appointments for life or good behavior. The method of appointment could be modeled upon the "Missouri plan" for the selection of judges. A committee of lawyers and laymen in each district would select two or three lawyers who they feel to be best qualified for the position. The governor or attorney general would make the appointment from this group. If during the selection process preference were given to those who have held the position of assistant state prosecutor, whether or not in the same district, a career service would be promoted and experience would be increased.

A State Department of Justice could much more effectively control abuses of discretion if it were established in connection with a system of state's attorneys. The head of such a department would either be the attorney general or a special director appointed by the governor. A di-

[209]42% of the Montana county attorneys interviewed said that they favored the adoption of the state's attorney system. They said that it is desireable because of the increasingly heavy burden being placed on county attorneys and because of the increasing complexity of the criminal law (mentioned by 2 county attorneys); that misdemeanors and felonies can and should be prosecuted by different officers (4); and that this system would avoid the conflict of interest problem which arises when a county attorney is required to prosecute one of his own clients (2). The prosecutors who opposed the state's attorney system said that the problem of geography would prevent the adequate prosecution of cases arising in the outlying portions of a judicial district (4), and thus would be against the interests of the smaller counties (2); that felonies and misdemeanors are so interrelated that they could not practically be prosecuted by different officers (2); that if the prosecution of felonies were removed, little of interest would remain in the job; and that the office of states attorney would be unattractive to lawyers, because, with no private practice, the state's attorney would be out of luck when he lost his job.

[210]Four county attorneys noted that an appointed prosecutor would be less subject to public pressure and could better perform the duties of his office; but another said that appointment, although desireable, would not be tolerated by the public. Election of the state's attorney was preferred by three county attorneys because appointment would create a political plum.

[211]A.B.A. COMMISSION ON ORGANIZED CRIME, *op. cit. supra* note 202, at 35-36, 260-265. Prosecuting attorneys are elected in all but five states: the court appoints in Connecticut; the attorney general appoints in Delaware; the governor appoints in New Jersey, Florida and Rhode Island.

rector might be more desirable since much of the attorney general's time is taken by duties of a civil nature. As in the federal system the primary responsibility for the prosecution of criminal offenses would reside in the head of the department. He should be given full powers to assist, supervise, and supersede the state's attorney. To make his control complete, he should also be given the duty to remove a state's attorney for misconduct, malfeasance, or nonfeasance. The governor should have the power to appoint a lawyer to supersede the head of the department if he neglects his responsibilities. In addition, if the head of the Department of Justice is an appointed director, the governor should be able to remove him for the same reasons.[212]

This proposed system for the administration of criminal prosecutions in Montana has recognized disadvantages: it would be expensive, and any attempt to implement it, which might require a constitutional amendment, would meet formidable opposition. However, this survey has demonstrated that although a great deal of necessary discretion exists in connection with the prosecution of crimes, the powers to control the actions of county attorneys are both inadequate and rarely exercised. The county attorney has great power and if this power is put to improper use the cost to society can be great. The value to society of having this broad and necessary discretion exercised by competent men subject to meaningful control is immeasurable.

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[212]Only 3 out of 25 county attorneys favored this type of centralization of responsibility. A major complaint was that any workable system of centralization would be far too expensive. Three prosecutors said the state is too large for the attorney general to exert any effective control over the prosecution of crimes; and three others said that each community has its own problems which must be dealth with locally. Four county attorneys said centralization would be acceptable if political control could be avoided, but that there would be a patronage problem if the attorney general had the power of appointment. Other county attorneys said that the effectiveness and desirability of a Department of Justice would depend too greatly on the caliber of the head of the department, that great pressure for corruption might be brought to bear on him, and that centralization would not be justified unless there were more serious problems of non-enforcement than exist now.

APPENDIX I.

OPINION QUESTIONNAIRE

County of.....

1. Do you feel that a County Attorney should have more or less discretion in the prosecution of crimes? ..... Why?

2. To what extent are you affected by public opinion in your exercise of discretion: to a great extent....., occasionally....., seldom....., not at all.....?
   a. Do you think that this effect is generally beneficial.....or generally harmful.....? Why?
   b. Specify any suggestions you might have as to how this effect might be reduced:

3. Would it be possible to extend or to curtail the amount of discretion exercised by County Attorneys in the prosecution of crimes?..... Have you any suggestions as to how this might be accomplished?
   a. By statute..... How could such a statute be enforced?
   b. By increasing the number of sub-classes under certain of the basic crimes, thereby giving the prosecutor a wider range of choices in determining the charge against the offender.
   c. By giving the County Attorney more voice in the determination of the sentence to be imposed on conviction.

4. Do you feel that a prosecutor should ever be civilly liable for either prosecuting or not prosecuting a criminal offender?..... If not, would you be in favor of legislation which would either:
   a. Immunize County Attorneys from all civil liability for conduct in the course of their duties....., or
   b. Protect County Attorneys from civil liability in all cases except those involving grossly negligent.....or malicious misfeasance or nonfeasance.....?
   c. Other types of legislation.

5. Does a County Attorney ever have a positive duty to investigate the facts of a reported or suspected crime?..... Please state any situation in which he would have such a duty.

6. Is a prosecutor, who is reasonably certain that he can prove that a crime has been committed and the identity of the criminal, obliged to prosecute under all circumstances?..... If you think that he is not, please specify any relevant circumstances.

7. Do you prosecute all criminal laws equally?..... If not, specify the reasons that you are more likely to prosecute violations of particular crimes. Please rank the reasons in the numerical order of their importance.

Number

.....The interests of society require that some laws be less strictly enforced.

.....Public pressure against the enforcement of certain laws.

.....Certain old laws are not applicable to modern conditions.

.....Certain crimes represent a greater threat to society.

.....Personal opinion that some laws should not be strictly enforced.

.....Failure of police and sheriff's office personnel to adequately investigate violation of particular laws.

.....Other reasons.

8. Approximately what proportion of the substantial reports of crimes coming to your attention go uninvestigated.....% and unprosecuted.....% for the primary reason that you lack the time and the financial resources to properly deal with them?

   a. If you are physically unable to attend to all, how do you select the reports that you will prosecute?

   b. If lack of resources were not a problem, what percentage of the crimes reported to you do you think you would investigate .....% and prosecute.....%? What would be the major reasons, other than lack of evidence for not prosecuting all crimes?

APPENDIX II.

INDIVIDUAL CRIME FORM

County of.....

Please report on the "last crime" occurring in this category:

1. Date of commission of crime.....
2. Name of offender.....
   a. Address..... g. Age.....
   b. Occupation..... h. Sex.....
   c. Annual income..... i. Race.....
   d. Number of dependents..... j. I.Q.-High....., Med....., Low.....
   e. Past offenses: specify approximate number....., and types.....
   .....
   f. Any other relevant personal information:
3. What agency conducted the investigation?.....

Was it well conducted....., adequately conducted....., or poorly conducted.....?

4. Did you encounter any pressure for or against the offender? Specify source and nature:

5. Has there been a large or unusual number of crimes of this nature committed in your county recently?.....

6. Before deciding whether to prosecute:

   a. What crime did you think the offender committed?.....

   b. What is the most serious charge on which you felt that you could secure conviction?.....

   c. Explain the reasons for any difference between your answers to questions a. and b.:

   d. Were you positive....., reasonably certain....., or uncertain ....., that you could secure a conviction, or were you positive that you could not secure a conviction.....?

7. If you have decided not to prosecute, or if the offender was charged with or convicted of a crime different from that which you think he actually committed, give the reasons for this in the order of their importance:

   Number

   .....lack of proof

   .....compromise for plea of guilty

   .....compromise for any other reason

   .....a belief that the statutory penalty for the offense committed is unduly harsh

   .....an attempt to save the county the burden of supporting the offender's dependents

   .....a judgment from the offender's record, character, and personality that a (longer) prison sentence would be harmful to him and to society

   .....other reasons:

8. If you have decided to prosecute, what were the basic factors, in the order of their importance, contributing to the decision?

   Number

   .....strength of the evidence

   .....seriousness of the offense

   .....character of the offender

.....a desire to punish the offender

.....the need to protect society by the isolation of the offender

.....the need to set an example

.....a desire to rehabilitate the offender

.....other reasons:

9. If a prosecution has been commenced:
   a. With what crime was the offender charged?.....
   b. What did the offender plead?.....
   c. Was he convicted..... or acquitted.....?
   d. With what offense was he convicted?.....
   e. Summarize any recommendation you might have made to the court in connection with sentencing, and the motive for them:
   f. What was the sentence imposed?.....
   g. Do you feel that this sentence was harsh....., satisfactory....., ... or lenient.....?
10. Explain any discretion you may have exercised in connection with this case which is not covered by your above answers:
11. If you anticipate further action on this case, or if you have been unable to release information which you would be willing to provide in the future, please so state. We will then send a follow-up questionnaire at a later date.

APPENDIX III.

PROCEDURES

The attitudes and practices of Montana county attorneys were studied through confidential questionnaires mailed to all prosecutors in the state, and through personal interviews with about half of them. The size and composition of the sample used in this study is illustrated in the accompanying Table Seventeen which shows the relationship between the type of contact made with the various county attorneys and the size of the counties represented by them. The survey was made possible by a grant of funds from the University of Montana.

Two types of questionnaires were mailed. One was a subjective opinion questionnaire. The other was an individual crime form. The crime form requested detailed personal information about an individual defendant, as well as information concerning the investigation of the crime, the reasons behind any discretionary acts taken by the prosecutor, and the outcome of the prosecution. Each county attorney was sent from

three to seven crime forms, depending upon the size of his county. A cover letter stated in part:

> A category of crime is specified at the top of each of the enclosed forms. Please fill out that form with the information on the LAST crime occurring in your county which fits the category specified, whether or not there has been a prosecution. By "last crime" we mean the last reported by any reasonably substantial source, in connection with which you are reasonably certain of the identity of the perpetrator. Even if you have not verified the report, or have decided not to prosecute, give us the information available on that offense. If two forms have been provided for a single category, complete them with information on the last two crimes which fit that category.

Every prosecutor received forms for each of three primary categories, including homicides, felonious thefts, and sex offenses. When more than three crime forms were sent to a prosecutor, one or two of the additional forms dealt with categories chosen at random from the following group: forgery, petit larceny, sale of liquor to minors, gambling, assault, and arson.

The results obtained from the opinion questionnaires and the interviews are thought to be more accurate than those obtained from the crime form returns. When completing the crime forms, county attorneys apparently tended to select cases in which there had been a full prosecution and a plea of not guilty. Despite this bias, the crime form results should provide a reasonable indication of the relationships between various factors involved in the prosecution of crimes.

APPENDIX IV.

TABLES

Table No. 8

Survey of Opinions of Montana County Attorneys*

	Total answers		Breakdown by county populations (000s)	
	No.	%	0–9	10–80
Number of C.A.'s answering some or all questions	42		25	17
Whether C.A. should have more or less discretion			%	%
Should have more	15	35.7	40.0	29.4
Sufficient amount at present	26	61.9	56.0	70.6
Should have less	1	2.4	4.0	0.0
Effect of public opinion on C.A.'s exercise of discretion				
To a great extent	3	7.7	13.6	0.0
Occasionally	18	46.2	54.5	35.3
Seldom	16	41.0	27.3	58.8
Not at all	2	5.1	4.6	5.9
Whether public opinion is harmful or beneficial				
Harmful	14	42.4	28.6	66.7
Beneficial	15	45.5	52.4	33.3
Both harmful and beneficial	4	12.1	19.0	0.0
Whether a C.A. ever has a positive duty to investigate the facts of a reported or suspected crime				
Yes	34	89.5	86.4	93.8
No	4	10.5	13.6	6.2
Whether a C.A., who is reasonably certain that he can prove that a crime has been committed and the identity of the criminal, is obliged to prosecute under all circumstances				
Yes	9	24.3	28.6	18.8
No	28	75.7	71.4	81.2
Whether the C.A. enforces all criminal laws with equal diligence				
Yes	5	17.2	10.5	30.0
No	24	82.8	89.5	70.0
Whether an increase in the District Courts' power to appoint special prosecutors would be desirable				
Yes	3	12.0	11.1	12.5
No	22	88.0	88.9	87.5
Whether it would be desirable for Montana to have State's attorneys who would prosecute all felonies in each judicial district				
Yes	10	41.7	25.0	50.0
No	14	58.3	75.0	50.0
Whether it would be desirable to centralize responsibility for effective prosecution in a state agency headed by an appointive officer				
Yes	3	12.0	14.3	11.1
No	22	88.0	85.7	88.9

* This table presents the answers given by Montana County Attorneys in response to questions asked in a mailed questionnaire and during field interviews.

Table No. 9

Survey of the Practices of Montana County Attorneys.

	Total answers		Breakdown by county populations (000s)	
	No.	%	0–9	10–80
Number of C.A.'s answering some or all questions	36		19	17
Investigation			%	%
Percent of a C.A.'s time used to investigate the facts of criminal cases (mean)	26	22.7	11.1	28.8
Co-operation between C.A.'s office and the various law enforcement agencies				
Good	14	53.8	66.7	47.1
Satisfactory	6	23.1	11.1	29.4
Poor	6	23.1	22.2	23.5
Whether the C.A. ever investigates the facts of a reported or suspected crime before a complaint is filed in the case				
Yes	22	84.6	88.9	82.4
No	4	15.4	11.1	17.6
Plea Bargaining				
Whether the C.A. engages in any form of plea bargaining				
Yes	22	88.0	77.8	93.8
No	3	12.0	22.2	6.2
Percentage of all felonies handled by C.A. which involve guilty pleas (mean)	15	88.1	89.0	87.5
Percentage of guilty pleas resulting from some form of bargain with the C.A. (mean)	15	73.3	62.5	75.0
Percentage of all cases handled by C.A. in which he engages in bargaining practices (mean)	24	50.5	23.3	66.8
Restrictions upon C.A.'s discretion				
Whether the C.A., against his wishes, has ever been forced by a court to institute a prosecution				
Yes	6	23.1	11.1	29.4
No	20	76.9	88.9	70.6
Whether a court has ever forced him to dismiss an action				
Yes	8	30.8	44.4	23.5
No	18	69.2	55.6	76.5
Whether a court has ever forced him to change the charge which he had brought against a defendant				
Yes	2	10.0	0.0	13.3
No	18	90.0	100.0	86.7
Whether the attorney general's supervisory powers over the actions of C.A.'s are sufficiently exercised				
Yes	22	88.0	100.0	81.3
Should exert more control	3	12.0	0.0	18.7
Resources				
Percentage of substantial reports of crimes that are not investigated because of lack of time and finances (mean)	32	6.1	5.3	7.3
Percentage of crimes that are not prosecuted because of lack of time and finances (mean)	32	10.8	11.6	9.6
Percentage of crimes that would not be investigated even though lack of resources were not a problem (mean)	30	5.2	3.5	7.3
Percentage of crimes that would not be prosecuted if there were sufficient resources (mean)	27	14.1	14.4	13.5
Percentage budget increase which would be necessary to enable a reasonable job of prosecution (mean)	19	36.8	20.0	44.6

Table No. 10

Statistics on Cases Reported in "Crime Forms" Involving a Plea of Guilty by the Defendant.

	Total cases		Probability of conviction*	Investigation				Prior convictions	Personal factor*
				County attorney involved	Good	Satisfactory	Poor		
	No.	%	Mean	%	%	%	%	Mean	Mean
Totals	54	100.0	2.0	29.6	50.0	44.4	5.6	1.2	—0.3
Division of cases according to the type of crime involved									
homicide and sex offenses	22	40.7	2.1	27.3	68.2	27.3	4.5	0.8	0.0
felonious theft and misc. offenses	32	59.3	1.9	31.2	37.5	56.3	6.2	1.5	—0.3
Division of cases according to the size of the county in which they arose									
0–9,999 residents	26	48.1	1.8	34.6	73.1	26.9	0.0	1.4	—0.7
10,000 or more residents	28	51.9	2.1	25.0	28.6	60.7	10.7	1.0	+0.1

* See Table No. 2, "Docket Study Based on Crime Forms," for an explanation of this factor.

Table No. 11

Statistics on Cases Involving a Conviction or an Acquittal.

	Total cases		Probability of conviction**	Investigation				Cases with bargain	Plea of not guilty	Prior convictions	Personal factor*
				C.A. involved	Good	Satisfactory	Poor				
	No.	%	Mean	%	%	%	%	%	%	Mean	Mean
Totals	74	100.0	2.1	32.4	44.6	45.9	9.5	44.6	24.3	1.6	—0.1
Categories of Crimes											
Homicide	19	25.7		26.3	42.1	42.1	15.8	21.1	52.6	0.9	+0.2
Felonious theft	23	31.1		30.4	39.1	52.2	8.7	69.6	0.0	1.7	—1.1
Sex offenses	19	25.7	2.2	36.8	57.9	31.6	10.5	42.1	26.3	2.0	—0.1
Misc. crimes	13	17.5	2.0	38.5	38.5	61.5	0.0	38.5	23.1	1.5	+0.8
Type of sentence rec'v'd..											
Prison	42	56.8	2.2	42.9	47.6	50.0	2.4	42.9	23.8	1.6	—1.0
Probation	22	29.7	2.0	18.2	36.4	45.5	18.1	59.1	0.0	1.1	+0.6
Fine	3	4.0	2.3	33.3	33.3	33.3	33.3	66.7	33.3	0.0	+2.0
(Acquittal)	7	9.5	2.0	14.3	57.1	28.6	14.3	0.0	100.0	2.8	+1.4
Sizes of counties in which the cases arose											
0–9,999 residents	39	52.7	2.1	35.9	66.6	25.6	7.8	43.6	25.6	2.0	—0.7
10,000 or more res.	35	47.3	2.2	28.6	20.0	68.6	11.4	45.7	22.9	1.2	+0.5

* For information on cases in which no complaint was filed or in which the prosecution was dismissed, see Table 2, "Docket Study Based on Crime Forms."

** See Table 2, "Docket Study Based on Crime Forms," notes b and c, for an explanation of these factors.

Table No. 12

Significance of Various Personal Characteristics of Defendants in the prosecution of Criminal Cases:

Statistics on All Cases Reported in "Crime Forms" During This Study, Part I.

	Totals		Outcome of the cases reported					Public Pressure		Investigation			With bargain	With guilty plea	Probability of conviction before deciding whether to prosecute				County attorney's opinion of sentence received		
	No.	Percent	No complaint filed	Case dismissed	Acquitted	Probation or fine	Prison	Against defendant	For defendant	Good	Satisfactory	Poor			Positive of conviction	Reasonably certain	Uncertain	Postive could not secure conviction	Harsh	Satisfactory	Lenient
Totals																					
No.	96		10	10	7	27	41	19	13	43	43	8	34	52	16	45	28	5	2	45	21
Per Cent		100.0	10.4	10.4	7.3	28.1	42.8	19.8	13.5	45.7	45.7	8.6	35.4	54.2	17.0	47.9	29.8	5.3	2.9	66.2	30.9
Residence		%	%	%	%	%	%	%	%	%	%	%	%	%	%	%	%	%	%	%	%
Transient	14	14.6	40.0	0.0	0.0	3.7	21.9	10.5	0.0	14.0	15.0	12.5	17.7	15.4	25.0	15.5	7.1	0.0	50.0	11.1	9.5
Out of county	18	18.7	0.0	20.0	28.6	22.2	17.1	10.5	15.4	32.5	2.5	37.5	14.7	23.1	31.2	17.8	17.9	0.0	0.0	17.8	28.6
In county	64	66.7	60.0	80.0	71.4	74.1	61.0	79.0	84.6	53.5	82.5	50.0	67.6	61.5	43.8	66.7	75.0	100.0	50.0	71.1	61.9
Occupation																					
Professional or student	9	9.7	12.5	16.7	11.1	2.5	2.5	11.1	25.0	12.8	9.3	0.0	8.8	6.0	0.0	11.6	14.8	0.0	50.0	4.7	5.3
White collar	6	6.4	25.0	0.0	16.7	7.4	2.5	0.0	8.3	5.1	9.3	0.0	5.9	8.0	6.7	4.7	7.4	25.0	0.0	7.0	0.0
Skilled	14	15.0	12.5	20.0	0.0	18.5	12.5	27.8	16.7	17.9	13.9	12.5	14.7	16.0	13.3	14.0	18.6	25.0	0.0	9.3	31.6
Un-skilled	47	50.0	37.5	50.0	66.6	48.1	55.0	50.0	41.7	43.6	53.6	50.0	55.9	48.0	53.3	48.8	44.4	50.0	50.0	58.1	36.8
Unemployed	17	18.4	12.5	10.0	0.0	14.9	27.5	11.1	8.3	20.6	13.9	37.5	14.7	22.0	26.7	20.9	14.8	0.0	0.0	20.9	26.3
Dependents																					
1 (excluding self)	7	7.3	20.0	0.0	50.0	30.8	10.0	11.1	25.0	27.3	17.6	25.0	21.4	27.8	20.0	20.0	22.2	0.0	0.0	21.4	14.3
2-4	23	24.0	80.0	66.7	50.0	61.5	70.0	77.8	75.0	54.5	76.5	75.0	64.3	61.1	60.0	73.3	66.7	100.0	100.0	78.6	57.1
5 or more	4	4.2	0.0	33.3	0.0	7.7	20.0	11.1	0.0	18.2	5.9	0.0	14.3	11.1	20.0	6.7	11.1	0.0	0.0	0.0	28.6
Age																					
0-21	25	27.2	0.0	40.0	28.6	29.2	25.0	27.8	23.1	27.5	28.6	25.0	30.3	34.0	31.2	24.4	28.6	25.0	100.0	25.6	30.0
22-64	65	70.6	100.0	60.0	71.4	70.8	70.0	66.7	76.9	70.0	69.0	75.0	66.7	62.0	62.5	75.6	67.9	75.0	0.0	72.1	65.0
65 or more	2	2.2	0.0	0.0	0.0	0.0	5.0	5.5	0.0	2.5	2.4	0.0	3.0	4.0	6.3	0.0	3.5	0.0	0.0	2.3	5.0

Table No. 12

Significance of Various Personal Characteristics of Defendants in the prosecution of Criminal Cases:

Statistics on All Cases Reported in "Crime Forms" During This Study, Part II.

	Totals		Outcome of the cases reported					Public Pressure		Investigation			With bargain	With guilty plea	Probability of conviction before deciding whether to prosecute				County attorney's opinion of sentence received		
	No.	Percent	No complaint filed	Case dismissed	Acquitted	Probation or fine	Prison	Against defendant	For defendant	Good	Satisfactory	Poor			Positive of conviction	Reasonably certain	Uncertain	Positive could not secure conviction	Harsh	Satisfactory	Lenient
Totals																					
No.	96		10	10	7	27	41	19	13	43	43	8	34	52	16	45	28	5	2	45	21
Per Cent		100.0	10.4	10.4	7.3	28.1	42.8	19.8	13.5	45.7	45.7	8.6	35.4	54.2	17.0	47.9	29.8	5.3	2.9	66.2	30.9
Intelligence		%	%	%	%	%	%	%	%	%	%	%	%	%	%	%	%	%	%	%	%
High	7	7.5	12.5	10.0	0.0	15.4	0.0	0.0	30.8	12.5	0.7	0.0	12.1	8.0	6.3	7.7	7.1	0.0	0.0	9.5	0.0
Average	59	63.4	87.5	30.0	85.7	61.5	69.2	82.4	46.1	50.0	72.1	87.5	48.5	60.0	37.5	71.8	67.9	50.0	100.0	64.3	62.5
Low	27	29.1	0.0	60.0	14.3	23.1	30.8	17.6	23.1	37.5	23.2	12.5	39.4	32.0	56.2	20.5	25.0	50.0	0.0	26.2	37.5
Prior convictions																					
0	49	53.8	62.5	60.0	85.7	65.5	36.8	47.0	61.5	65.0	42.1	50.0	42.4	44.9	53.3	53.7	50.0	100.0	100.0	40.9	52.6
1	16	17.6	25.0	30.0	0.0	11.5	21.1	17.6	15.4	17.5	15.7	12.5	21.2	18.4	6.7	19.5	21.4	0.0	0.0	22.7	15.8
2	14	15.4	0.0	10.0	0.0	11.5	23.7	11.8	7.7	10.0	21.1	25.0	21.2	24.5	13.3	19.5	14.3	0.0	0.0	18.2	21.1
3 or more	12	13.2	12.5	0.0	14.3	11.5	18.4	23.6	15.4	7.5	21.1	12.5	15.2	12.2	26.7	7.3	14.3	0.0	0.0	18.2	10.5
Public Opinion																					
Strong for	1	1.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	2.0	0.0	0.0	0.0	0.0	0.0
For	16	16.7	20.0	10.0	0.0	29.7	9.8	0.0	100.0	20.9	9.3	12.5	17.6	15.4	25.0	15.5	7.1	20.0	0.0	15.6	14.3
Against	14	14.6	20.0	10.0	0.0	11.7	19.5	89.5	0.0	9.3	18.6	0.0	14.7	13.5	31.2	11.1	21.9	0.0	50.0	15.6	14.3
Strong against	4	4.2	10.0	0.0	0.0	0.0	4.9	10.5	0.0	2.3	7.0	0.0	2.9	1.9	6.2	0.0	3.5	0.0	0.0	4.5	0.0
Sex																					
Female	7	7.3	20.0	10.0	14.3	3.7	4.9	0.0	7.7	2.3	9.3	25.0	2.9	1.9	0.0	2.2	14.3	20.0	0.0	6.6	0.0
Race																					
Non-white	8	8.3	10.0	0.0	14.3	3.7	12.2	10.5	0.0	4.6	13.9	0.0	5.9	3.8	6.3	6.7	14.3	0.0	0.0	6.6	4.8

Table No. 13

Significance of Various Personal Characteristics of Defendants in the Prosecution of Criminal cases:

All Homicides and Sex Offenses Reported in the "Crime Forms."

	Totals		Outcome of cases		Investigation			With bargain	With guilty plea	Probability of conviction			
	No.	Percent	All dispositions other than imprisonment	Imprisonment	Good	Satisfactory	Poor			Positive of conviction	Reasonably certain	Uncertain	None
Totals													
No.	51		27	23	26	21	4	12	21	8	22	17	4
Per Cent		100.0	54.0	46.0	51.0	41.2	7.8	23.5	41.2	15.7	43.2	33.3	7.8
		%	%	%	%	%	%	%	%	%	%	%	%
Residence													
Non-county and transient	19	37.3	61.1	38.9	68.4	15.8	15.9	36.8	68.4	26.3	47.4	26.3	0.0
In county	32	62.7	50.0	50.0	44.8	51.7	3.5	15.6	25.0	9.4	40.6	37.5	12.5
Occupation													
Un-skilled and unemployed	31	63.3	41.9	58.1	46.7	43.3	10.0	22.6	38.7	20.7	48.3	24.1	6.9
All others	18	36.7	75.0	25.0	50.0	44.4	5.6	27.8	50.0	11.1	33.3	50.0	5.6
Dependents													
1 (excluding self)	3	5.9	66.7	33.3	66.7	33.3	0.0	66.7	100.0	33.3	66.7	0.0	0.0
2 or more	15	29.4	64.3	35.7	50.0	28.6	21.4	26.7	33.3	20.0	33.3	33.3	13.4
Age													
0–21	12	24.5	30.0	70.0	33.3	66.7	0.0	33.6	50.0	9.1	36.4	45.4	9.1
22 or older	37	75.5	58.3	41.7	55.6	33.3	11.1	21.6	37.8	18.9	43.2	32.5	5.4
Intelligence													
High	4	8.0	100.0	0.0	75.0	25.0	0.0	25.0	25.0	0.0	66.7	33.3	0.0
Average	30	60.0	56.7	43.3	31.0	58.7	10.3	20.0	40.0	7.1	42.9	46.4	3.6
Low	16	32.0	35.7	64.3	73.3	20.0	6.7	25.0	37.5	40.0	26.7	20.0	13.3
Prior convictions													
0	30	60.0	62.1	37.9	66.7	25.9	7.4	26.7	43.3	20.0	40.0	30.0	10.0
1 or more	20	40.0	40.0	60.0	33.3	55.6	11.1	20.0	35.0	10.5	47.4	42.1	0.0
Sex													
Female	5	9.8	80.0	20.0	20.0	60.0	20.0	0.0	0.0	0.0	25.0	50.0	25.0
Race													
Non-white	6	11.8	33.3	66.7	33.3	66.7	0.0	16.7	16.7	16.7	50.0	33.3	0.0
Public opinion													
For defendant	8	15.7	71.4	28.6	50.0	37.5	12.5	12.5	25.0	0.0	62.5	25.0	12.5
Against defendant	15	29.4	35.7	64.3	41.7	58.3	0.0	33.3	33.3	23.1	30.8	46.1	0.0

Table No. 14

Significance of Various Personal Characteristics of Defendants in the Prosecution of Criminal cases:

All Felonious Thefts and Miscellaneous Minor Offenses Reported in the "Crime Forms."

	Totals		Outcome of cases		Investigation			With bargain	With guilty plea	Probability of conviction			
	No.	Percent	All dispositions other than imprisonment	Imprisonment	Good	Satisfactory	Poor			Positive of conviction	Reasonably certain	Uncertain	None
Totals													
No.	45		27	18	17	22	4	22	31	8	23	11	1
Per Cent		100.0	60.0	40.0	39.5	51.2	9.3	48.9	68.9	18.6	53.5	25.6	2.3
Residence		%	%	%	%	%	%	%	%	%	%	%	
Non-county and transient	13	28.9	30.8	69.2	58.4	33.3	8.3	30.8	53.8	33.3	50.0	16.7	0.0
In county	32	71.1	71.9	28.1	32.3	58.0	9.7	56.2	75.0	12.9	54.8	29.0	3.3
Occupation													
Un-skilled and unemployed	33	75.0	54.5	45.5	35.5	51.6	12.9	51.5	69.7	19.4	51.6	29.0	0.0
All others	11	25.0	72.7	27.3	45.5	54.5	0.0	45.5	54.5	9.1	63.6	18.2	9.1
Dependents													
1 (excluding self)	4	8.9	100.0	0.0	25.0	50.0	25.0	25.0	50.0	0.0	33.3	66.7	0.0
2 or more	12	26.7	66.7	33.3	9.1	90.9	0.0	58.4	66.7	9.1	63.6	18.2	9.1
Age													
0-21	13	30.2	76.9	23.1	53.8	30.8	15.4	46.1	84.6	30.8	46.1	23.1	0.0
22 or older	30	69.8	50.0	50.0	31.0	62.1	6.9	50.0	63.3	14.2	53.6	28.6	3.6
Intelligence													
High	3	7.0	100.0	0.0	66.7	33.3	0.0	100.0	100.0	33.3	33.3	33.3	0.0
Average	29	67.4	51.7	48.3	37.9	48.3	13.8	34.5	62.1	14.8	59.3	22.2	3.7
Low	11	25.6	72.7	27.3	36.4	63.6	0.0	81.8	90.9	27.2	36.4	36.4	0.0
Prior convictions													
0	19	46.4	84.2	15.8	42.1	47.4	10.5	31.6	47.4	11.2	55.5	27.8	5.5
1 or more	22	53.6	42.9	57.1	36.4	54.5	9.1	68.2	90.9	23.8	47.6	28.6	0.0
Sex													
Female	2	4.4	50.0	50.0	0.0	50.0	50.0	50.0	50.0	0.0	0.0	100.0	0.0
Race													
Non-white	2	4.4	50.0	50.0	0.0	100.0	0.0	50.0	50.0	0.0	0.0	100.0	0.0
Public opinion													
For defendant	8	17.8	75.0	25.0	83.3	16.7	0.0	62.5	75.0	57.1	42.9	0.0	0.0
Against def.	4	8.8	66.7	33.3	0.0	100.0	0.0	25.0	75.0	60.0	20.0	20.0	0.0

Table No. 15

Significance of Various Personal Characteristics of Defendants in the Prosecution of Criminal cases:

All Cases Reported from Counties with Populations of from 0 to 9,999.

	Totals		Outcome of cases		Investigation			With bargain	With guilty plea	Probability of conviction			
	No.	Percent	All dispositions other than Imprisonment	Imprisonment	Good	Satisfactory	Poor			Positive of conviction	Reasonably certain	Uncertain	None
Totals													
No.	50		24	26	33	14	3	13	27	13	17	16	2
Per Cent		100.0	48.0	52.0	66.0	28.0	6.0	26.0	54.0	27.1	35.4	33.3	4.2
Residence			%	%	%	%	%	%	%	%	%	%	%
Non-county and transient	25	50.0	40.0	60.0	79.2	12.5	8.3	28.0	68.0	33.3	41.7	25.0	0.0
In county	25	50.0	56.0	44.0	53.8	42.3	3.9	24.0	40.0	19.2	34.6	38.5	7.7
Occupation													
Un-skilled and unemployed	30	63.8	30.0	70.0	62.1	27.6	10.3	30.0	56.7	32.1	39.3	25.0	3.6
All others	17	36.2	80.0	20.0	70.6	29.4	0.0	23.5	52.9	17.6	35.3	47.1	0.0
Dependents													
1 (exclud'g self)	4	8.0	75.0	25.0	75.0	25.0	0.0	25.0	50.0	33.3	33.3	33.3	0.0
2 or more	10	20.0	55.6	44.4	60.0	30.0	10.0	30.0	60.0	30.0	30.0	40.0	0.0
Age													
0–21	12	25.0	54.5	45.5	58.4	33.3	8.3	16.7	58.3	27.3	36.4	27.3	9.0
22 or older	36	75.0	45.7	54.3	70.6	23.5	5.9	30.6	52.8	27.8	36.1	36.1	0.0
Intelligence													
High	3	6.3	100.0	0.0	100.0	0.0	0.0	0.0	33.3	0.0	66.7	33.3	0.0
Average	26	54.2	45.8	54.2	57.7	34.6	7.7	26.9	50.0	16.7	37.5	45.8	0.0
Low	19	39.5	44.4	55.6	70.6	23.5	5.9	26.3	57.9	47.4	26.3	21.0	5.3
Prior Convictions													
0	24	49.0	69.6	30.4	76.2	19.0	4.8	16.7	41.7	29.2	33.3	33.3	4.2
1 or more	25	51.0	27.8	72.2	60.0	32.0	8.0	32.0	56.0	23.8	38.1	38.1	0.0
Sex													
Female	1	2.0	100.0	0.0	0.0	0.0	100.0	0.0	0.0	0.0	0.0	100.0	0.0
Race													
Non-white	6	12.0	33.3	66.7	50.0	50.0	0.0	33.3	33.3	0.0	40.0	60.0	0.0
Public opinion													
For defendant	6	12.0	83.3	16.7	100.0	0.0	0.0	50.0	83.3	33.3	50.0	16.7	0.0
Against defend't	12	24.0	11.1	88.9	50.0	50.0	0.0	16.7	41.7	33.3	25.0	41.7	0.0

Table No. 16

Significance of Various Personal Characteristics of Defendants in the Prosecution of Criminal cases:

All Cases Reported from Counties With Populations of 10,000 or More.

	Totals		Outcome of cases		Investigation			With bargain	With guilty plea	Probability of conviction			
	No.	Percent	All dispositions other than Imprisonment	Imprisonment	Good	Satisfactory	Poor			Positive of conviction	Reasonably certain	Uncertain	None
Totals													
No.	46		30	16	10	30	5	17	25	3	26	13	3
Per Cent		100.0	65.2 %	34.8 %	22.2 %	66.7 %	11.1 %	37.0 %	54.3 %	6.7 %	57.7 %	28.9 %	6.7 %
Residence													
Non - county and transient	7	15.2	71.4	28.6	14.3	57.1	28.6	14.3	42.9	12.5	62.5	25.0	0.0
In county	39	84.8	64.1	35.9	23.7	68.4	7.9	41.0	56.4	5.4	56.8	29.7	8.1
Occupation													
Un-skilled and unemployed	33	73.3	63.6	36.4	24.3	63.6	12.1	36.4	54.5	6.4	61.3	29.0	3.2
All others	12	26.7	75.0	25.0	16.7	75.0	8.3	41.6	50.0	8.3	58.3	16.7	16.7
Dependants													
1 (excluding self)	4	8.7	100.0	0.0	0.0	100.0	0.0	25.0	75.0	0.0	50.0	50.0	0.0
2 or more	17	37.0	70.6	29.4	18.7	68.7	12.6	35.3	41.2	6.2	56.2	18.8	18.8
Age													
0–21	13	29.5	69.2	30.8	30.8	61.5	7.7	53.8	76.9	15.4	46.1	38.5	0.0
22 or older	31	70.5	64.5	35.5	16.1	71.0	12.9	29.0	45.2	3.4	62.1	24.1	10.4
Intelligence													
High	4	8.9	100.0	0.0	50.0	50.0	0.0	75.0	75.0	25.0	50.0	25.0	0.0
Average	34	75.6	61.8	38.2	20.6	64.7	14.7	26.5	50.0	6.5	61.3	25.7	6.5
Low	7	15.5	71.4	28.6	14.3	85.7	0.0	71.4	71.4	0.0	42.9	42.9	14.2
Prior convictions													
0	26	57.8	73.1	26.9	28.0	60.0	12.0	23.1	46.1	4.2	58.3	25.0	12.5
1 or more	19	42.2	57.9	42.1	15.8	73.7	10.5	57.9	68.4	10.5	57.9	31.6	0.0
Sex													
Female	6	13.0	83.3	16.7	16.7	66.6	16.7	16.7	16.7	0.0	20.0	60.0	20.0
Race													
Non-white	3	6.5	33.3	66.7	0.0	100.0	0.0	0.0	0.0	33.3	33.3	33.3	0.0
Public opinion													
For defendant	13	28.3	61.5	38.5	37.5	50.0	12.5	23.1	30.8	11.1	55.6	22.2	11.1
Against defend't	6	13.0	50.0	50.0	0.0	100.0	0.0	33.3	33.3	25.0	50.0	25.0	0.0

Table No. 17

	Grouping of Montana Counties by population in 000s (1960 census)					
	Total	0– 2	3– 9	10–19	20–39	40–80
Total number of counties in group	56	11	24	14	3	4
Individual Crime Forms:						
No. of county attorneys returning Forms	29	4	14	8	2	1
No. of Forms returned	96	8	44	31	8	5
No. of Opinion Questionnaires returned	27	4	14	7	1	1
No. of county attorneys interviewed	25	1	7	11	3	3
No. of county attorneys who neither replied to questionnaires nor were interviewed during this survey	14	7	5	1	0	1